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Supreme Court of the United States

October Term, 1993

MANUFACTURERS HANOVER
LEASING CORPORATION,

Petitioner,

v.

HAROLD G. LOWREY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES VOGT
REYNOLDS, RIDINGS, VOGT & MORGAN
First National Center West
120 N. Robinson, Suite 2200
Oklahoma City, OK 73102
(405) 232-8131
Counsel of Record

-and-

RICHARD GERARD
Manufacturers Hanover Leasing
Corporation
270 Park Avenue, 39th Floor
New York, NY 10017
(212) 270-5026
Counsel for Petitioner

January 25, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Section 547(b) of the Bankruptcy Code provides that a transfer by a debtor on an antecedent debt to a creditor within 90 days of bankruptcy can be avoided. With respect to a creditor, however, who is an insider of the debtor, such a transfer within one year of the bankruptcy of the debtor can be avoided. The question presented is:

> Whether a transfer by a debtor on an antecedent debt between 90 days and one year preceding the date of bankruptcy to a non-insider creditor, which is not otherwise avoidable, can be avoided where such creditor holds a guaranty of the antecedent debt from an insider of the debtor, pursuant to 11 U.S.C. §§ 547(b) and 550(a) of the Bankruptcy Code?

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, Manufacturers Hanover Leasing Corporation hereby discloses that it is a corporation and its parent is Manufacturers Hanover Trust Company. During the course of these proceedings Manufacturers Hanover Trust Company was merged with Chemical Bank, and the name of the successor entity is Chemical Bank.

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UNITED STATES CONSTITUTION

U.S. CONST. art. I, § 8 14

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PETITION FOR WRIT OF CERTIORARI

Manufacturers Hanover Leasing Corporation ("Manufacturers Hanover") petitions this Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the judgment in *In re Robinson Brothers Drilling, Inc.*, 6 F.3d 701 (10th Cir. 1993). Respondent is Harold G. Lowrey, Trustee of Robinson Brothers Drilling, Inc. and Robinson Brothers Drilling Company ("Robinson Brothers"), debtors under Chapter 11 of the Bankruptcy Code.

OPINIONS BELOW

On January 11, 1988, the United States Bankruptcy Court for the Western District of Oklahoma granted summary judgment to Manufacturers Hanover. The Order Granting Motion for Summary Judgment is reprinted at Appendix App. 29. The United States District Court for the Western District of Oklahoma reversed the decision of the Bankruptcy Court. The Memorandum Decision and Order is reported at 97 B.R. 77 (W.D. Okla. 1988) and reprinted at Appendix App. 3. Before remand, the District Court certified the matter for interlocutory appeal, and the Tenth Circuit Court of Appeals accepted the case for review. The Tenth Circuit affirmed the decision of the District Court adopting the District Court Opinion and remanded the case. This decision is reported at 892 F.2d 850 (10th Cir. 1989) and reprinted at Appendix App. 1.

After remand, the Bankruptcy Court conducted a trial of the adversary proceeding. On February 19, 1991, the Bankruptcy Court filed its Supplemental Findings of Fact and Conclusions of Law which are reprinted at Appendix App. 33. On February 22, 1991, the Bankruptcy Court entered Judgment which is reprinted at Appendix App. 45. On May 9, 1991, the Bankruptcy Court filed Supplemental Findings of Fact and Conclusions of Law and an Amended Judgment which is reprinted at Appendix App. 47. On May 24, 1991, the Bankruptcy Court again amended the Judgment which is reprinted at Appendix App. 56.

On December 10, 1992, the United States District Court for the Western District of Oklahoma affirmed the Judgment of the Bankruptcy Court. This decision is

reprinted at Appendix App. 58. On September 28, 1993, the United States Court of Appeals for the Tenth Circuit affirmed the decision of the District Court. The issue presented to the Tenth Circuit in the prior interlocutory appeal was again presented to the Tenth Circuit in this appeal, and the Tenth Circuit reaffirmed its prior position on this issue. This decision is reported at 6 F.3d 701 (10th Cir. 1993) and reprinted at Appendix App. 18.

JURISDICTION

This Petition arises under the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code"), 11 U.S.C. § 101 *et seq.* The date of the decision of the Court of Appeals for the Tenth Circuit is September 28, 1993. Manufacturers Hanover filed a timely Petition for Rehearing which was denied by the Tenth Circuit on October 29, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

11 U.S.C. §§ 547 and 550 of the Bankruptcy Code provide in relevant part:

> **§ 547. Preferences**
>
> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

§ 550. Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction

The jurisdiction of the Bankruptcy Court was invoked under 28 U.S.C. §§ 1334 and 157(b). The jurisdiction of the District Court was invoked under 28 U.S.C. § 158(a). The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 158(d).

II. Statement of Facts

Manufacturers Hanover entered into several loan transactions with Robinson Brothers Drilling in 1978 and 1979. Robinson Brothers used the loan proceeds to purchase drilling rigs and a helicopter. As a part of these loan transactions, Manufacturers Hanover requested and received the personal guaranty of J. D. Hodges ("Hodges"). Hodges was the president, chief executive officer and controlling shareholder of Robinson Brothers and thus was indisputably an "insider" of Robinson Brothers according to the Bankruptcy Code. 11 U.S.C. § 101(30). Each of the loan agreements required that Robinson Brothers make payments on either a monthly or quarterly basis. Robinson Brothers made some of the required monthly and quarterly payments within the year preceding bankruptcy, but none within the 90 days preceding bankruptcy.

On July 23, 1983, several creditors of Robinson Brothers filed an involuntary petition under Chapter 7 of the Bankruptcy Code. On August 8, 1983, upon application of Robinson Brothers, the case was converted to a case under Chapter 11 of the Bankruptcy Code. Harold G.

Lowrey was appointed as Trustee of Robinson Brothers by the Bankruptcy Court.

On April 11, 1986, the Trustee commenced an adversary proceeding against Manufacturers Hanover and other creditors seeking to avoid transfers made by Robinson Brothers to Manufacturers Hanover and other creditors during the period of 90 days to one year preceding the bankruptcy of Robinson Brothers. Because Manufacturers Hanover held a guaranty from Hodges, the Trustee contended that Hodges was a creditor of Robinson Brothers because he held a contingent claim as a result of his guaranty of the debt of Robinson Brothers to Manufacturers Hanover. The Trustee contended that these transfers benefitted a creditor of Robinson Brothers, namely Hodges. The Trustee alleged that each transfer by Robinson Brothers to Manufacturers Hanover resulted in a benefit to Hodges because of the reduction in liability on his guaranty. Even though the transfers were direct from Robinson Brothers to Manufacturers Hanover, whom the Trustee stipulated was a non-insider creditor, and even though each of the transfers was more than 90 days prior to bankruptcy, the Trustee argued that the transfers could be avoided because Hodges was an insider of Robinson Brothers and, therefore, the extended preference period would apply.

Manufacturers Hanover defended the Trustee's action contending that the transfers were to a non-insider creditor and, therefore, because the transfers were more than 90 days prior to bankruptcy, the provisions of 11 U.S.C. § 547(b)(4)(A) would prohibit recovery from Manufacturers Hanover.

III. Proceedings Below

Manufacturers Hanover moved for summary judgment because, among other reasons, the Trustee stipulated that all of the transfers were more than 90 days prior to bankruptcy. The Bankruptcy Court sustained the motion because of the ambiguities in § 550(a) and the fact that a review of the statute did not indicate that Congress intended to circumvent § 547(b)(4)(A) by permitting recovery from non-insider creditors for transfers more than 90 days prior to bankruptcy. The Trustee appealed and the District Court reversed and remanded deciding that the so-called "plain meaning" of sections 547 and 550 would allow recovery against non-insider creditors.

Before remand, the District Court certified the matter for an interlocutory appeal and the Tenth Circuit Court of Appeals accepted the case for review. The Tenth Circuit affirmed the District Court in a *per curiam* Opinion and remanded the case.

Because the appeal decided only one issue, the Bankruptcy Court conducted a trial of the remaining issues. The Bankruptcy Court granted a portion of the Trustee's requested relief and denied the remaining portion. A money judgment was entered against Manufacturers Hanover.

Manufacturers Hanover appealed to the District Court. Among other issues appealed to the District Court, Manufacturers Hanover contended that Hodges received no benefit as a result of the transfers. Manufacturers Hanover contended that because of Hodges' substantial personal insolvency, which the Bankruptcy Court determined was at least $96,000,000, the transfer by Robinson

Brothers of $175,000 to Manufacturers Hanover did not benefit Hodges because it had little or no effect on his substantial insolvency. In addition, Manufacturers Hanover contended that the language in the personal guaranty continued to impose liability on Hodges regardless of the transfers and, therefore, there was no reduction in Hodges' liability and hence, no benefit to Hodges. The District Court affirmed the decision of the Bankruptcy Court. Manufacturers Hanover appealed to the Tenth Circuit Court of Appeals, and the Tenth Circuit affirmed the District Court decision.

REASONS FOR GRANTING THE WRIT

I.

THE EXPANDED PREFERENCE PERIOD FOR CREDITORS HOLDING GUARANTIES OF INSIDERS IS AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW

The issues outlined in this Petition have a significant impact on numerous daily transactions between creditors and debtors which in many instances, involve significant amounts of money. It would be impossible to determine the number of insider guaranties held by creditors in this country. However, considering the amount of litigation that has occurred in bankruptcy courts over this issue, it is clear that an opinion by the United States Supreme Court on this issue would settle conflicts among bankruptcy courts, district courts and appellate courts and provide uniformity on this issue, thereby providing creditors and debtors with a uniform law. This issue is of

considerable importance to the lending community and trade creditors, both of whom frequently require guaranties from insiders in credit transactions. Manufacturers understands that associations of lenders and other creditors may request permission to file amicus briefs in support of this Petition and, if certiorari is granted, on the merits.

The genesis of this problem began in 1978, when Congress reformed the bankruptcy laws and enacted the Bankruptcy Code found at 11 U.S.C. § 101 *et seq.* Prior to the Bankruptcy Reform Act of 1978, case law and the Bankruptcy Act provided that the trustee in bankruptcy could recover a preferential transfer only from an entity in whose hands it represented a preference within the terms of the preference avoidance section itself. *Dean v. Davis*, 242 U.S. 348, 443, 37 S.Ct. 130, 131, 61 L.Ed. 419 (1917). Bankruptcy Act § 60, 11 U.S.C. § 96.

Since the Bankruptcy Code was enacted in 1978, numerous bankruptcy courts have addressed the issue raised by this Petition. During the early to mid 1980's, virtually all of the bankruptcy courts which addressed the issue reached the same result although they used different theories and reasons in reaching the result.

One approach used by several bankruptcy courts was the "two transfer" approach. *In re Mercon Industries, Inc.*, 37 B.R. 549 (Bankr. E.D. Pa. 1984). Simply stated, the "two transfer" approach in the context of avoidable preference analysis viewed the payment from the debtor as consisting of a direct transfer to the non-insider creditor and a separate indirect transfer of benefit to the insider guarantor. The non-insider creditor was not an initial transferee

or an immediate transferee of the second transfer, and thus no recovery could be made from such creditor by applying § 550(a)(1) or (2). Since the first, direct transfer to such non-insider was made outside the applicable 90-day preference of § 547(b)(4)(A), the first transfer was also not avoidable as to that non-insider.

Another approach used by several bankruptcy courts employed the equitable powers of the bankruptcy court in determining that transfers to non-insider creditors between 90 days and one year could not be avoided by the trustee. To allow recovery from the non-insider creditors would in effect penalize an innocent non-insider for its prudence in seeking a guarantor of the debt. *In re R. A. Beck Builder, Inc.*, 34 B.R. 888 (Bankr. W.D. Pa. 1983). *In re Aerco Metals, Inc.*, 60 B.R. 77 (Bankr. N.D. Tex. 1985).

Another theory involved the interplay between the provisions of 11 U.S.C. §§ 547(b) and 550. These bankruptcy courts reasoned that allowing a trustee to recover from a non-insider creditor pursuant to the provisions of § 550 would in effect expand the preference period from 90 days to one year as to non-insider creditors which was not provided for under the provisions of § 547. *In re Cove Patio Corp.*, 19 B.R. 843 (Bankr. S.D. Fla. 1982).

The overwhelming majority of bankruptcy courts which addressed this issue refused to impose liability on non-insider creditors for transfers more than 90 days prior to bankruptcy. Only one bankruptcy court imposed liability on the non-insider creditor pursuant to the provisions of §§ 547 and 550. *In re Big Three Transport, Inc.*, 41 B.R. 16 (Bankr. W.D. Ark. 1983).

In 1989, the Seventh Circuit Court of Appeals was the first circuit court of appeals to address this issue. *Levit v. Ingersoll Rand Financial Corp., (In re V.N. Deprizio Construction Co.)*, 874 F.2d 1186 (7th Cir. 1989). The Seventh Circuit determined that transfers between 90 days and one year to non-insider creditors holding the guaranties of insiders were subject to avoidance by the trustee. This decision has since been referred to as the *Deprizio* rule. According to the First Circuit Court of Appeals, "The *Deprizio* rule represents a radical departure from pre-Bankruptcy Code practice." *In re Erin Food Services, Inc.*, 980 F.2d 792, 797 (1st Cir. 1992).

The *Deprizio* issue has prompted considerable debate among bankruptcy practitioners, bankruptcy law professors and bankruptcy judges. It has also been the subject of literally hundreds of articles and commentaries.[1] *See* Lawrence P. King, 4 *Collier on Bankruptcy* ¶ 550.02 at 550-8 (15th ed. 1987), and Vern Countryman, *The Trustee's Recovery in Preference Actions*, 3 *Bankruptcy Developments Journal*, 449, 464 (1986), both stating that non-insider creditors should not be liable based on the theory of equity. *See also*, Thomas E. Pitts, Jr., *Insider Guaranties and the Law of Preferences*, 55 Am. Bankr. L.J. 343 (1981), stating that recovery should be allowed from non-insider creditors, and Phillip I. Blumberg, *The Law of Corporate Groups: Bankruptcy Law Section 9.03* (1985 & Supp. 1988), contending that the answer should depend on whether

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[1] *See* Borowitz, *Waiving Subrogation Rights and Conjuring Up Demons in Response to Deprizio*, 45 Bus. Law. 2151, n.2 (1990) listing numerous articles on *Deprizio*.

the insider is solvent. *See also*, Henk J. Brands, *The Interplay Between Sections 547(b) and 550 of the Bankruptcy Code*, 89 Colum. L. Rev. 530, 542-46 (1989), wherein the writer contends that the *Deprizio* rule is flawed because pre-Code practice did not recognize such expansive recovery rights and the legislative history of Code § 550 offers no conclusive evidence of specific congressional intent to depart from the pre-Code practice. *See also*, Katzen, *Deprizio and Bankruptcy Code Section 550: Extended Preference Exposure Via Insider Guaranties and Other Perils of Initial Transferee Liability*, 45 Bus. Law. 511-537 (1990), discussing the impact of the *Deprizio* rule. *See also*, Baker, *Repayments of Loans Guaranteed by Insiders as Avoidable Preferences in Bankruptcy; Deprizio and Its Aftermath*, 23 U.C.C. L.J. 115126 (1990) contending that the statutory construction in *Deprizio* is incorrect, and Higgins and Peterson, *Is There a One-Year Preference Period for Non-Insiders?*, 64 Am. Bankr. L.J. 383 (1990) criticizing the logic and reasoning in *Deprizio* and *Robinson Brothers*.

Until the Supreme Court decides this issue, the debate will continue. Even though two other circuit courts of appeal followed *Deprizio*, *In re C-L Cartage Co.*, 899 F.2d 1490 (6th Cir. 1992) and *In re Suffola*, 2 F.3d 977 (9th Cir. 1993), many bankruptcy courts and district courts refuse to follow *Deprizio* because they contend that the reasoning in *Deprizio* is flawed and the result is incorrect.[2] Again, the analysis by these courts is varied, further

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[2] Only the Seventh and Ninth Circuits attempted a statutory construction of §§ 547(b) and 550(a). The other circuit courts adopted the *Deprizio* rationale without any significant discussion of the statutory scheme of the Bankruptcy Code.

evidencing the continued uncertainty regarding this issue. In the case of *Matter of Midwestern Companies, Inc.*, 102 B.R. 169 (W.D. Mo. 1989) the district court reasoned that the *Deprizio* interpretation effectively obliterates specific distinctions in § 547(b)(4) between insiders and non-insider creditors. Furthermore, the court stated, "Basic statutory construction requires that statutes be construed in harmony with one another favoring no one statute over another, except that specific statutes limit the scope of general statutes." p. 173. *See also, In re Performance Communications, Inc.*, 126 B.R. 473 (Bankr. W.D. Pa. 1991) determining that *Deprizio* fails to follow basic canons of statutory construction because it only considered a part of the statute when the entire statute should have been considered "to produce a harmonious whole." p. 476 *See also, In re Rubin Bros. Footwear, Inc.*, 119 B.R. 416 (S.D.N.Y. 1990) rejecting *Deprizio* on policy grounds because of its presumed detrimental effects on commercial lending markets.

Thus, those creditors which transact business on a nationwide basis are faced with conflicting court decisions which causes considerable uncertainty in business transactions with debtors, particularly those debtors whose debts are in default and risk the possibility of bankruptcy. For example, a creditor negotiating with a debtor in the Southern District of New York, where *Deprizio* has been rejected, must negotiate with this debtor on a different basis than with a debtor in the Northern District of Illinois, where *Deprizio* is followed. Moreover, a creditor holding the guaranty of an insider such as a subsidiary or the parent of a debtor which has significant operations in Chicago and New York City may

be subjected to "forum shopping" by the debtor in electing where to file its bankruptcy petition. The debtor, by filing in Chicago, can co.nmence an adversary preference action against the creditor in a bankruptcy court in Chicago to avoid and recover transfers to the creditor between 90 days and one year preceding bankruptcy while if the debtor files in the bankruptcy court in New York City, it may not be able to avoid the same transfers because of the refusal by the District Court in the Southern District of New York to follow the *Deprizio* rule.

Creditors and debtors within the jurisdiction of the First Circuit Court of Appeals also face uncertainty regarding the *Deprizio* issue. In *Erin Food Services, supra,* the First Circuit elected to decide the non-insider creditor issue by addressing the issue of benefit to the insider, rather than trying to solve the *Deprizio* puzzle. The *Erin* court acknowledged the disputes over *Deprizio* and the difficulties involved in attempting to unravel congressional intent in sections 547(b) and 550(a). *Erin Food Services, supra* at 798.

Meanwhile, creditors and debtors continue to transact business facing uncertainty and the continued dilemma of dealing with troubled debts amidst the conflicting court decisions. The United States Constitution mandates that Congress enact uniform bankruptcy laws. U.S. CONST. art. I, § 8. Presumably, when Congress enacted the Bankruptcy Code in 1978, it believed that Sections 547 and 550 would create a uniform law. Unfortunately, as has been demonstrated, certain provisions of these statutes have not been interpreted uniformly by the courts. Unless the United States Supreme Court decides

this issue, preference litigation in bankruptcy courts regarding insider guaranties will continue unabated.

II.

THE COURT OF APPEALS INCORRECTLY CONSTRUED SECTIONS 547 AND 550 OF THE CODE AND FAILED TO GIVE EFFECT TO MATERIAL STATUTORY LANGUAGE.

Section 547 of the Code covering voidable preferential transfers is one of several code sections giving the trustee power to avoid transfers made by the debtor. Section 547(b) contains the five elements of a preference action and authorizes the trustee to avoid a transfer if each and every one of those elements is present.

Section 547(c) imposes additional limitations on the trustee's power to avoid preferential payments by creating seven categories of transfers which are exempt in whole or in part from avoidance if the creditor or party in interest against whom recovery or avoidance is sought can establish such exception as applicable to the transfer. See Appendix App. 64. Subsections (b) and (c) of § 547 are clearly interrelated. Indeed, the exceptions contained in (c) are expressly integrated into (b) at the very outset of that subsection.

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of the property of the debtor in property . . . .

Thus, the subsection (b) provisions as to avoidability and the subsection (c) provisions as to nonavoidability are two sides of the same point. Each of the elements of avoidable preference in (b) must be established and none

of the exceptions in (c) may be present before a transfer may be avoided.

Of particular significance in this case is the element of an avoidable preferential transfer as set forth in subsection (b)(4) of § 547 which provides that the transfer must be made

> (A) On or within 90 days before the date of the filing the petition; or
>
> (B) Between 90 days and one year before the date of the filing the petition, if such creditor, at the time of such transfer was an insider;

Thus, transfers to non-insiders prior to 90 days before the filing of the petition commencing the bankruptcy case are not avoidable. However, transfers to insiders (as defined in § 101(30)) may be avoidable if made at any time within one year of the filing. Had the circuit court simply attempted to determine if all the elements of an avoidable preference contained in § 547 were present as to Manufacturers Hanover with respect to the transfers in issue, it would have found that subsection (b)(4) was not satisfied since such transfers were made beyond the 90-day period of subsection (b)(4)(A) which is applicable to non-insiders. Instead, the circuit court held that Manufacturers Hanover could be vicariously liable for transfers which were avoidable as to the insider guarantor, by finding that Manufacturers Hanover was an initial transferee under § 550(a)(1) of the Code of avoidable transfers made for the benefit of the insider.

In reaching its conclusion, the Tenth Circuit failed to give effect to material language of § 550(a) and as a consequence, the material language of § 547(b)(4)(A) as

well. Section 550(a) of the Code implements the avoidance sections of the Code, including § 547, by prescribing the persons for whom a recovery may be had from a transfer that had been avoided and the limits on such recovery. It provides:

> (a) Except as otherwise provided in this section, *to the extent that a transfer is avoided under section* 544, 545, *547*, 548, 549 or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer is made; or
>
> (2) any immediate or mediate transferee of such initial transferee (Emphasis added).

The Tenth Circuit held that a literal interpretation of § 550(a)(1) authorized recovery from creditors, like Manufacturers Hanover, who received payment on their debts from the debtor, and thus are arguably initial transferees, even though the trustee could not satisfy all of the requirements of § 547(b) with respect to the payments to them. This interpretation was erroneous, since it completely ignores the qualifying language of § 550(a) which permits recovery only "to the extent that a transfer is avoided under . . . section 547." Indeed, no mention whatsoever, let alone discussion, of this material statutory provision appears in the circuit court opinion, not even as part of its quotation of the statute itself. This, despite the circuit court's stated reliance on the "plain language" of the statute.

This interpretation by the circuit court fails to give effect to all of the material language of each statute, nor does it consider the statutory scheme in general relating to avoidance actions. As recently stated by this Court with respect to the Bankruptcy Code,

> [V]iewed in the isolated context of . . . [the statutory phrase] the phrase could reasonably be given the meaning petitioner asserts. Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. . . . That is the case here. (Citations omitted).

United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 370 (1988).

The circuit court, without mentioning the "to the extent" limitation upon § 550 recovery, indicated that non-insider creditors with insider guaranties "still have section 547(c) defenses available, if applicable." *Robinson Bros.*, 97 B.R. 82. *See also Deprizio supra* at 1199. But this concession fatally undercuts the rationale of the circuit court decision and the cases upon which it relies. Under that rationale, subsection (c) defenses of the non-insider creditor, like subsection (b) defenses, should not be considered at all once a transfer is avoidable under § 547(b) as to the insider guarantor, since the so-called "plain language" of § 550 entitles the trustee to recover from the non-insider creditor, i.e., the "initial transferee," without regard to whether the transfer would be independently

subject to avoidance as to that creditor. Under the rationale of the circuit court opinion, once it is determined that a transfer is avoidable as to the guarantor, there is no need to make any further determination as to whether the transfer is independently avoidable as to the initial transferee creditor and the defenses of that creditor under subsection (c) of § 547, as well as those under subsection (b), are irrelevant. To be consistent, the circuit court should have concluded that if subsection (c) defenses are available to Manufacturers Hanover, the subsection (b) defenses also must be available, including the 90-day limitation period on avoidance actions. Thus, Manufacturers Hanover submits that the circuit court improperly construed the provisions of sections 547 and 550 and furthermore failed to consider the entire statutory scheme of the Bankruptcy Code as it relates to avoidance actions.

CONCLUSION

The debate regarding the *Deprizio* rule continues because bankruptcy courts, district courts and courts of appeal have issued conflicting decisions on this important but unsettled question of federal law. Without a decision by this Court, credit transactions will remain unsettled causing continued and unnecessary litigation in the various courts.[3] The circuit court's misinterpretation

[3] The Supreme Court may wish to solicit the opinion of the Solicitor General on this matter because the federal government through the appointment of the Federal Deposit Insurance Corporation as receiver of a failed bank many times holds the guaranties of insiders on troubled debts. In addition, many times the federal government demands guaranties from insiders

of sections 547 and 550 of the Bankruptcy Code, because of its failure to consider the entire statutory scheme of the Bankruptcy Code, misapplies the principles of statutory construction established by this Court in *United Savings Ass'n v. Timbers, supra.*

For the foregoing reasons, this Court should grant a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review its decision in this case and resolve the question regarding the *Deprizio* rule.

Respectfully submitted,

JAMES VOGT
REYNOLDS, RIDINGS, VOGT & MORGAN
First National Center West
120 N. Robinson, Suite 2200
Oklahoma City, OK 73102
(405) 232-8131
Counsel of Record

- and -

RICHARD GERARD
Manufacturers Hanover Leasing Corporation
270 Park Avenue, 39th Floor
New York, NY 10017
(212) 270-5026
Counsel for. Petitioner

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through its agencies that make loans such as the Small Business Administration or the Department of Housing and Urban Development. In *Deprizio*, the United States argued that the "to the extent" provisions of § 550(a) "should be read to mean that the trustee can recover from a particular creditor only 'to the extent that' he satisfies the requirements of § 547 as to that creditor." Page 10 of United States Brief in *Deprizio*.

In re ROBINSON BROTHERS DRILLING INC., and Robinson Brothers Drilling Company, Debtors.

MANUFACTURERS HANOVER LEASING CORP.; Halliburton Company; Gray Tool Company; and Ponder Fishing Tools, Inc., Defendants-Appellants,

v.

Harold G. LOWREY, Chapter 11 Trustee, for the Estate of the Debtors, Plaintiff-Appellee.

No. 88-2982.

United States Court of Appeals, Tenth Circuit.

Nov. 9, 1989.

Theodore Gewertz (Lawrence P. King, of Wachtell, Lipton, Rosen & Katz, New York City; James Vogt, Norman E. Reynolds, and V. Burns Hargis, of Reynolds, Ridings & Hargis, Oklahoma City, Okl., Richard Gerard, of Mfrs. Hanover Leasing Corp., New York City, Robert N. Sheets, of Phillips, McFall, McVay, Sheets, Juras & Lovelace, Doneen Douglas Jones, of Fellers, Snider, Blankenship, Bailey & Tippens, and Bruce Kerr, of Mahaffey & Gore, Oklahoma City, Okl., with him on the brief), of Wachtell, Lipton, Rosen & Katz, New York City, for defendants-appellants.

Gary L. Morrissey of Kenan & Peterson, Oklahoma City, Okl., for plaintiff-appellee.

John J. Gill, General Counsel, and Michael F. Crotty, Associate General Counsel, of the American Bankers Ass'n, Washington, D.C., amicus curiae.

Before TACHA, BARRETT, and BRORBY, Circuit Judges.

PER CURIAM.

We affirm the judgment of the district court below and adopt its opinion, which is published at 97 B.R. 77.

In re ROBINSON BROTHERS DRILLING, INC., and Robinson Brothers Drilling Company, Debtors.

Harold G. LOWREY, Chapter 11 Trustee, for the Estate of Debtors, Plaintiff,

v.

FIRST NATIONAL BANK OF BETHANY; Global Fluids, Inc.; Gray Tool Company; Halliburton Co.; J.D. Hodges, an individual; ITT Commercial Finance Corp.; Lor, Inc.; Manufacturers Hanover Leasing Corp.; and Ponder Fishing Tools, Inc., Defendants.

No. CIV-88-732-P.
Bankruptcy No. 83-1962-A.
Adv. No. 86-0252.

United States District Court,
W.D. Oklahoma

Nov. 9, 1988.

Gary L. Morrisey, Kenan & Peterson, Oklahoma City, Okl., for plaintiff.

Peter G. Pierce, III, Carson, Rayburn, Pierce & Mueller, Robert N. Sheets, McFall, McVay, Sheets, Lovelace & Juras, Richard J. Gore, R. Bruce Kerr, Oklahoma City, Okl., for defendants.

James Vogt, Reynolds, Ridings & Hargis, Oklahoma City, Okl., for Manufacturers Hanover Leasing Corp.; Richard Gerard, New York City of counsel.

Doneen Douglas Jones, Fellers, Snider, Blankenship Bailey & Tippens, Oklahoma City, Okl., for Halliburton Co.

Robert N. Sheets, Phillips, McFall, McVay, Sheets, Juras & Lovelace, Oklahoma City, Okl., For Gray Tool Co.

Bruce Kerr, Mahaffey & Gore, Oklahoma City, Okl., for Ponder Fishing Tools.

MEMORANDUM DECISION
AND ORDER

PHILLIPS, District Judge.

I. HISTORY OF PROCEEDINGS

Before the Court is the appeal from the bankruptcy court's Order Granting Motion for Summary Judgment, filed January 11, 1988. Appellant Harold G. Lowrey, Chapter 11 Trustee, filed his brief on May 12, 1988. First National Bank of Bethany, et al., Appellees, filed a response on June 8, 1988, to which Appellant replied on June 27, 1988. Appellees filed a special reply brief on July 11, 1988, and a letter of additional authorities was mailed to the court on August 31, 1988. Appellant filed a special reply brief on August 12, 1988. Oral arguments were heard by the Court on September 22, 1988.

A. FACTS

The facts in this appeal from summary judgment are undisputed. They are:

(1) J.D. Hodges personally guaranteed payment of certain debts owed by Robinson Brothers Drilling, Inc. ("RBDI") to each Appellee.

(2) J.D. Hodges was a corporate officer and shareholder of RBDI.

(3) During the period between 90 days and one year before RBDI entered bankruptcy, RBDI made payments in partial satisfaction of RBDI's debts to Appellees.

(4) On July 25, 1983, involuntary bankruptcy petitions were filed against RBDI.

(5) None of the Appellees are insiders of RBDI within the definition of Title 11 U.S.C. § 101(30)(B).

(6) J.D. Hodges was an insider of RBDI within the definition of Title 11 U.S.C. § 101(30)(B).

Brief of Appellant at 5 (filed May 12, 1988); Answer Brief of Appellees at 1-2 (filed June 8, 1988).

B. RELEVANT STATUTES

The statutes at issue in this case are Title 11 U.S.C. § 547(b)(1) & (b)(4)(B) and Title 11 U.S.C. § 550(a)(1). Section 547(b)(1) & (b)(4)(B) provides that the trustee in bankruptcy can avoid a transfer of money "to or for the benefit of a creditor . . . made – between ninety days and one year before the date of the filing of the petition if such creditor at the time of such transfer was an insider." Title 11 U.S.C. § 550(A)(1) provides that the trustee may recover from "the initial transferee of such transfer or the entity for whose benefit such transfer was made."

C. THE BANKRUPTCY COURT'S DECISION

In its summary judgment order of January 11, 1988, the bankruptcy court ruled as follows:

> [T]he Trustee, under these circumstances, cannot utilize 11 U.S.C. § 550(a) to recover payments received by defendants who hold guarantees of J.D. Hodges, an insider of debtor, outside of the 90 day period and within one year of the filing of the bankruptcy. Furthermore, the [Bankruptcy] Court finds that a reading of 11 U.S.C. § 550(A) does not indicate that Congress explicitly intended to circumvent 11 U.S.C. § 547 by permitting recovery for transfers outside of the 90 day period and within one year from non-insider creditors. Based upon the ambiguities in 11 U.S.C. § 550, the [Bankruptcy] Court must consider the equities involved. A review of the equitable considerations and long settled credit practices involving guarantees, mitigates against permitting recovery from the non-insider creditors.

Order Granting Motion For Summary Judgment at 2.

The District Courts and bankruptcy judges have struggled for years with transactions involving debtors who pay preferential debts while on the brink of bankruptcy. One of the issues in this area which has received little treatment by the circuit courts is under what circumstances a transfer can be avoided and recovered when the transfer is made to a creditor which benefits a guarantor who is an insider of the debtor. The specific issue now before the Court is whether a debtor's transfer, made more than 90 days before but within one year of the filing of the bankruptcy petition, to a non-insider creditor who

holds a guarantee from an insider of the debtor, constitutes an avoidable preference recoverable by the trustee from the non-insider creditor. Unlike the bankruptcy court below, this Court answers the question in the affirmative, holding that such a transaction constitutes an avoidable preference under the bankruptcy laws.

II. STANDARD OF REVIEW

In reviewing a bankruptcy court's decision, the district court functions as an appellate court and is authorized to affirm, reverse or modify the bankruptcy court's ruling or to remand the case for further proceedings. Fed.R.Bankr.P. 8013. The Court may examine the bankruptcy court's conclusion of law *de novo*. *In re Mullet*, 817 F.2d 677, 678-79 (10th Cir.1987). A bankruptcy appeal allows the district court to make an independent determination of the bankruptcy court's conclusions when legal conclusions are drawn from undisputed evidence. *In re Golf Course Builders Leasing, Inc.*, 768 F.2d 1167, 1169 (10th Cir.1985) (citing *Colorado Springs Nat'l Bank v. United States*, 505 F.2d 1185, 1189 (10th Cir.1974)).

III. LEGAL DISCUSSION

There are two schools of thought regarding the issue of whether a trustee can avoid and recover a transfer of money paid to non-insider creditors during the preferential period when such debt was paid for the benefit of an insider guarantor. One school, representing the minority view, advocates strict construction of the plain meaning of the statutes in question. The other school relies on the

creation of a "two-transfer" theory to overcome the express language of the statutes by an equity argument.

Appellees argued below that the "two-transfer" theory applies to the circumstances of the present case. Under this theory, the first transfer is represented by the direct payment from the debtor to the Appellees. The second transfer is represented by the indirect transfer to the guarantor by virtue of the satisfaction of the guarantor's contingent liability. *See Kellogg v. Blue Quail Energy, Inc. (In re Compton)*, 831 F.2d 586, 591-95 (5th Cir.1987), *reh'g granted*, 835 F.2d 584 (1988) (per curiam) (citing *National Bank of Newport v. National Herkimer County Bank*, 225 U.S. 178, 184, 32 S.Ct. 633, 635, 56 L.Ed. 1042 (1912); 11 U.S.C. § 101(50) (definition of transfer); and discussing *In re Mercon Indus., Inc.*, 37 B.R. 549, 552 (Bankr.E.D. Pa.1984)). Appellees argue that under Section 547(b)(4)(B), only the second transfer to the guarantor, an insider, is within the preferential period and therefore avoidable; the first transfer to the Appellees is not avoidable, however, because they are not insiders. The Court finds this argument unpersuasive to overcome the express language of the statutes for the reasons developed below.

The contrary school of thought is represented by jurists who have strictly construed the statutes. The Trustee defends this minority view, and argues that a Trustee under Section 547)b)(1) & (b)(4)(B) can avoid a transfer of money "to *or for the benefit of* a creditor . . . made – between ninety days and one year before the date of the filing of the petition, *if such creditor at the time of such transfer was an insider.*" 11 U.S.C. § 547(b)(1) & (b)(4)(B) (emphasis added).

The Trustee reasons that the guarantor (Hodges) was an insider, and that as a guarantor, he is a creditor. The Bankruptcy Code defines creditor as "an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(9)(A). The Trustee buttresses this argument that a guarantor is included in the definition of creditor by citing the legislative history of Title 11 U.S.C. § 101(9)(A) found in the definitional section of the Code: "A guarantor of or surety for a claim against the debtor will also be a creditor, because he will hold a contingent claim against the debtor that will become fixed when he pays the creditor whose claim he has guaranteed or insured." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 309-10 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 22 (1978), U.S. Code Cong. & Admin.News 1978 pgs. 5787, 5808, 6266-6267 *quoted in Norton Bankr. Code Pamphlet* 1987-1988 Ed., [21]; 4 *Collier on Bankruptcy*, § 547.18 (15th ed. 1981). Thus, part one of the Trustee's argument is that under Section 547(b)(1) & (b)(4)(B) the transfer is avoidable. *See* H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 375 (1977) *reprinted in* 1978 U.S.Code Cong. & Admin.News 5787, 6331 (avoidance/recovery bifurcation discussion).

In the second part of the Trustee's analysis, it is urged that under Section 550(a)(1) a trustee may recover from "the *initial transferee of such transfer* [i.e. Appellees] *or* the entity for whose benefit such transfer was made [i.e. guarantor Hodges]." 11 U.S.C. § 550(a)(1) (emphasis added).[1] In short, the Trustee seeks a literal interpretation

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[1] As one critic has observed:

> As hard as one searches, one is unable to uncover any material evidence in the Code or its legislative history

of Sections 547(b)(1) & (b)(4)(B) and 550(a)(1) which, when read in conjunction with Section 101(9)(A), would clearly allow an avoidance of the transfer from the debtor to Appellees made within the preferential period. This transfer, the Trustee contends, can be recovered because it served to benefit an insider (i.e. guarantor Hodges) of the debtor. In this Court's view the intent of Congress seems clear, and cannot be circumvented by the creation of a "two-transfer" theory.

> that Congress intended paragraph 550(a)(1) to operate less than literally merely because of one of the potential defendants designated in that paragraph supplies the factual predicate for avoiding a transfer. In fact, in the original bills approved by the Senate and the House of Representatives, each version of Section 550 mandated recovery from the "initial transferee".

Pitts, *Insider Guaranties and the Law of Preferences*, 55 Am.Bankr.L.J., 343, 347 (1981) (citing S. 2266, 95th Cong. 2d Sess. § 101 (1978) (proposed 11 U.S.C. § 550(a)(1); H.R. 8200, 95th Cong. 1st Sess. § 101 (1977) (proposed 11 U.S.C. § 550(a)(1))).

"In the precursor to Section 550 proposed by the Commission on the Bankruptcy Laws of the United States, the primary target of the trustee's recovery was likewise the initial transferee." REPORT OF THE COMMISSION OF THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc No. 93-137, 93rd Cong. 1st Sess. Pt. II, at 127 (1973) (§ 4-409(a)). "In explaining this section, the Commission stated that it 'covers all initial transferees of recoverable property, *not just those preferred.*')" *Id.* at 180 n. 2 (emphasis supplied by reporting court) *reported in In re Big Three Transp., Inc.*, 41 B.R. 16, 21 n. 1 (Bankr.W.D. Ark.1983).

The Court notes that the Tenth Circuit has not squarely ruled on this issue.[2] However, after the bankruptcy court's decision in the present case, the Seventh Circuit developed a hypothetical example that is foursquare with the circumstances of this case. The Seventh Circuit set forth a persuasive policy that is in alignment with the Trustee's argument in this case:

> There is a related, and more nettlesome, question about the use of equitable powers under § 550(a). Genuine transferees can be caught in a time warp as a result of the special treatment of inside guarantors. Suppose Firm borrows money from Lender, with Guarantor and surety. When Firm pays off the debt, Lender is the "initial transferee" and Guarantor is an "entity for whose benefit [the] transfer was

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[2] The Fourth Circuit has accepted the "two-transfer" theory in principle, and acknowledged equity can be considered. But the compelling circumstances before that Circuit, and the principal case it cited, dealt with mere conduits of funds who initially accepted money, without consideration, and simply transferred the money to the second transferee. Thereafter, the trustees tried to recover money from these initial transferees. *In re Harbour*, 845 F.2d 1254, 1255-58 (4th Cir.1988) (holding mother of ultimate recipient accepted initial transfer and her bad faith precluded equity); *see also Katz v. First Nat'l Bank of Glen Head*, 568 F.2d 964, 969 n. 4 (2nd Cir.1977) (acknowledging broad definition of transfer), *cert. denied*, 434 U.S. 1069, 98 S.Ct. 1250, 55 L.Ed.2d 771 (1978) *cited in Kellogg v. Blue Quail Energy, Inc. (In re Compton)*, 831 F.2d at 591-94 (application of doctrine of indirect transfer used as a sword to avoid a letter of credit transfer). This Court believes that the two actual transfers, and the "mere conduit" problem in those cases make them clearly distinguishable from the circumstance under review where there is only the fiction of the second transfer.

made". The payment of a debt benefits the guarantor. Each may have received a preference voidable under § 547 (and therefore recoverable under § 550). If Guarantor is a stranger to Firm, the trustee may recover only preferences within 90 days of the petition. 11 U.S.C. § 547(b)(4)(A). If guarantor is an "insider" at the time of the transfer, the preference period lasts a year. 11 U.S.C. § 547(B)(4)(B). Section 547(B)(4) distinguishes according to the status of Guarantor, but § 550 does not. It says that if a transfer is recoverable by the trustee, it may be recovered from *either* the "initial transferee" (Lender) or the "entity for whose benefit such transfer was made" (Guarantor). This creates a situation that several courts have perceived to be "inequitable": Lender must satisfy the trustee (if Firm goes bankrupt between 91 days and a year after the preference) when Guarantor is an insider but not when Guarantor is a stranger, yet it seems, this has nothing to do with any proper theory of Lender's liability. Most bankruptcy courts that have addressed this question conclude that "equity" will relieve Lender from a literal construction of § 550. Commentators, whose articles collect and discuss the cases, are divided. We have serious doubts both about the amount of equity in Lender's position (for Firm may have paid Lender preferentially only to assist Guarantor, the insider, and Lender is in a good position to monitor the performance of its debtor; if Firm collects from Lender, Lender may collect in turn from Guarantor, bearing the risk of Firm's insolvency it planned to bear all along) and about the propriety of judges' declining to enforce statutes that produce inequitable results. Bankruptcy statutes are not special cases. We

> mention the problem not to resolve it (for it is not before us) but to show that this appeal to "equity" – to deny recovery against an "initial transferee" within the statute – is different in source and scope from the way in which we have employed considerations of policy to *define* "transferee" under § 550(a)(1). Doubts about this use of equity do not imply that courts should take "transferee" for all it could be worth rather than for what a sensible policy implies it is worth.

Bonded Fin. Serv., Inc. v. European Am. Bank, 838 F.2d 890, 894-95 (7th Cir.1988) (dictum) (citations omitted) (emphasis in original). Admittedly, the Seventh Circuit spoke to this issue only in dictum, but this Court is persuaded to follow the Seventh Circuit's sound guidance for heeding the clear intent of Congress, as have other courts. *In re V.N. Deprizio Constr. Co.*, 86 B.R. 545 (N.D.Ill.1988) *rev'g* 58 B.R. 478 (Bankr.N.D.Ill.1986); *In re Coastal Petroleum Corp.*, 91 B.R. 35 (Bankr.N.D.Ohio 1988); *In re Big Three Transp., Inc.*, 41 B.R. 16 (Bankr.N.D.Ill.1986).

The majority view among lower courts who have decided the issue is supported by either the "two-transfer" theory discussed above, or by relying on the equitable powers of the bankruptcy court under Title 11 U.S.C. § 105 to prevent injustice, or both.[3] *See, e.g.*, note 2 above and the authorities cited therein; *In re Mercon Indus., Inc.*, 37 B.R. 549, 552 (Bankr.E.D.Penn.1984); *Seeley v. Church*

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[3] Although Appellees argued the "two-transfer" theory below, there is no mention of this theory in the ruling of the bankruptcy court.

Bldgs. & Interiors Inc. (In re Church Bldgs. & Interiors, Inc.), 14 B.R. 128, 131 (Bankr.W.D.Okla.1981); *In re V.N. Deprizio Constr. Co.*, 58 B.R. 478, 480 (Bankr.N.D.Ill.1986), *rev'd*, 86 B.R. 545 (N.D.Ill.1988); 4 *Collier on Bankruptcy*, ¶ 550.02 (15th ed. 1983).

The stated policy reason behind developing the "two-transfer" theory is that, in effect, strict construction of the statutes prejudices informal debt reorganization practices by punishing creditors who insist on guarantors. *See e.g., 4 Collier on Bankruptcy*, ¶ 550.02. *But see In re V.N. Deprizio Constr. Co.*, 86 B.R. at 553. This reasoning overstates the issue. Only insider guarantors trigger the one-year preference avoidance mechanism of Section 547(b). Non-insider creditors with non-insider guarantors are not included in the expanded one-year preference period. Moreover, creditors still have Section 547(c) defenses available, if applicable.

In the present case the bankruptcy court followed the lower court majority view by using its equitable powers to overcome what it perceived as ambiguities in the statutes. Order Granting Motion For Summary Judgment at 2. *But see In re V.N. Deprizio Constr. Co.*, 86 B.R. at 552-53 (persuasive criticism of the equity argument).

IV. RESOLUTION OF ISSUE ON APPEAL

It is rare that this court substitutes its judgment for that of any of the outstanding bankruptcy judges who serve the Western District of Oklahoma. Their expertise and judgment in the field of Bankruptcy is rarely subject to credible challenge. This case, however, presents a matter of pure statutory interpretation applied to undisputed

facts. Moreover, other courts have addressed the issue since the bankruptcy court's decision below. This Court believes that the minority view, advocating a literal interpretation of the Bankruptcy Code as enacted by Congress, is the most persuasive and compelling, and avoids the result-oriented approach of the "two-transfer" theory.

The equitable powers of the bankruptcy court under Section 105 to avoid strict construction of the Code is limited. *Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1228, 99 L.Ed.2d 428 (1988) (quoting *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 791 F.2d 524, 528 (7th Cir.1986), *cert. denied*, 481 U.S. 1068, 107 S.Ct. 2460, 95 L.Ed.2d 869 (1987) ("the fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be")); *Guerin v. Weil, Gotshal & Manges*, 205 F.2d 302, 304 (2nd Cir.1953).[4]

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[4] *See also Cooper Petroleum Co. v. Hart*, 379 F.2d 777 (5th Cir.1967); *In re Aerco Metals, Inc.*, 60 B.R. 77 (Bankr. N.D.Tex.1985); Nutovic, *The Bankruptcy Preference Laws: Interpreting Code Sections 547(c)(2), 550 (a)(1), and 546(a)(1)*, 41 BUS.LAW. 175, 186-91 (Nov.1985); and Pitts, *Insider Guaranties and the Law of Preferences*, 55 AM.BANKR.L.J. 343 (1981) (non-insider creditor is liable if there is an insider guarantor); *cf.* P. Blumberg, *The Law of Corporate Groups: Problems in Bankruptcy*, § 9.03 (1985) *discussed in Bonded Fin. Serv., Inc. v. European Am. Bank*, 838 F.2d at 894 ("liability should turn on Guarantor's solvency"); and *Norton Bankruptcy Law Advisor*, "Insider Guarantees and Preference Liability – Round Three Article 4," Professor Boshkoff (1986-10) *cited in in re Vermont Toys Works, Inc.*, 82 B.R. 258, 326 n. 42 (Bankr.D.Vt.1987).

The Court is persuaded that a transfer to a creditor for the benefit of an insider guarantor can be avoided and recovered. The mischief that the Code is attempting to correct by its plain language is the situation where a debtor is in financial trouble and contemplates paying preferential debts on the brink of bankruptcy. In that instance, one creditor is preferred over others because an insider who guaranteed the note on the debt will be contingently liable upon debtor's default.[5] Thus, under the Code a trustee can avoid these transfers made on behalf of an insider guarantor during the more broad preferential period of 90 days to one year. With plain language, Congress developed this hard and fast rule to help prevent litigation over the issue of bad faith preferential payments by debtors. Unfortunately, this rule does not necessarily have a just result in all cases. Under the present case, for example, there is no evidence of bad faith associated with the payments by the debtor. However, because the transfer of money to Appellees serves to benefit the guarantor Hodges, who is an insider, the transfer is covered by the statutes, and is thus avoidable and recoverable.

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[5] These insiders commonly benefit in the form of increased salaries, bonuses or stock dividends, from the debtor's receipt of the funds, when the monies serve to increase the debtor's revenue. When the debtor's demise is imminent, the insiders who guaranteed the debtor's loan frequently hold enough sway with the debtor to cause it to pay off these guaranteed loans prior to the payment of other obligations. Consequently, the insiders have diverted resources to protect themselves. *In re Mercon Indus. Inc.*, 37 B.R. at 553. For a definition of insider of a corporate debtor see Title 11 U.S.C. § 101(30)(B).

V. CONCLUSION

Accordingly, the bankruptcy court's Order Granting Motion For Summary Judgment is REVERSED and the case is REMANDED for further proceedings consistent with this Order.

IT IS SO ORDERED.

In re ROBINSON BROTHERS DRILLING, INC. and Brothers Drilling Company, Debtors.

Harold G. LOWREY, Trustee, Appellee,

v.

MANUFACTURERS HANOVER LEASING CORP., Appellant,

and

Global Fluids, Inc.; ABB Vecto-Gray, Inc., formerly known as Gray Tool Company; First National Bank of Bethany, Oklahoma; Halliburton Company; J.D. Hodges; ITT Commercial Finance Corporation; Lor, Inc.; Ponder Fishing Tools, Inc., Creditors.

No. 93-6016.

United States Court of Appeals,
Tenth Circuit.

Sept. 28, 1993.

James Vogt, of Reynolds, Ridings, Vogt & Morgan, Oklahoma City, OK and Richard Gerard, Manufacturers Hanover Leasing Corp., New York City, for appellant.

Gary L. Morrissey, Oklahoma City, OK, for appellee.

Before LOGAN and BRORBY, Circuit Judges, and KANE,* District Judge.

BRORBY, Circuit Judge.

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* Honorable John L. Kane, Jr., Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

We are called upon in this appeal[1] to consider the unusual suggestion that, for purposes of the preferential transfer section of the Bankruptcy Code, a comparatively minor reduction in a preferred creditor's extensive financial liabilities conferred no cognizable economic benefit on the creditor because his remaining debts still vastly overwhelmed his assets. Reasons both legal and practical lead us to reject such a view.

The Trustee brought this adversary proceeding under 11 U.S.C. §§ 547(b) and 550(a) to avoid and recover certain allegedly preferential prepetition transfers by debtors to various creditors, including appellant Manufacturers Hanover Leasing Corp. (Manufacturers). Because these payments were made more than ninety days but less than one year before the petition was filed, the Trustee relied on § 547(b)(4)(B), which permits avoidance of preferential transfers within this relatively remote time frame if the benefitting creditor was an insider. Although Manufacturers itself was an outsider, debtors' obligation to Manufacturers had been guaranteed by debtors' president, chief executive officer, and controlling shareholder, J.D. Hodges. On a prior appeal in this same proceeding, this court recognized that as guarantor of a debt on which his corporation had made prepetition payment, Hodges could fulfill the insider-creditor requirement of the statute. *See Manufacturers Hanover Leasing*

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. Accordingly, appellant's request for oral argument is denied and the case is ordered submitted on the briefs.

Corp. v. Lowrey (In re Robinson Bros. Drilling, Inc.), 892 F.2d 850 (10th Cir.1989) (adopting district court opinion, *see Lowrey v. First Nat'l Bank (In re Robinson Bros. Drilling, Inc.)*, 97 B.R. 77 (W.D.Okla.1988), holding that § 547(b)(4)(B) permits avoidance of transfer to noninsider-creditor inuring to benefit of insider-guarantor). Other circuits have likewise found § 547(b)(4)(B) satisfied in connection with such "trilateral-preference" arrangements. *See Ray v. City Bank & Trust Co. (In re C-L Cartage Co.)*, 899 F.2d 1490, 1494 (6th Cir.1990); *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1200-01 (7th Cir.1989).

On remand from that earlier decision, Manufacturers defended against the Trustee's adversary complaint by arguing, among other points, that: (1) Hodges' hopeless insolvency precluded him from gaining a cognizable benefit from a merely partial reduction in his liabilities; (2) even if such a benefit were theoretically possible, the actual $175,000 reduction in Hodges' guarantor liability to Manufacturers was de minimus relative to his overall negative net worth (over $96 million) and, thus, should not be recognized as a benefit; and (3) in any event, Hodges' liability exposure was not really reduced by debtors' prepetition transfer because his guaranty provided "it shall continue to be effective, or be reinstated, as the case may be, if at any time payment [by debtors] . . . is rescinded or must otherwise be restored or returned by [Manufacturers] upon [debtors'] insolvency, bankruptcy or reorganization . . . , all as though such payment had not been made." Appellant's App. at 90 (bankruptcy court quoting guaranties). On appeal from

the ensuing judgment entered in favor of the Trustee, Manufacturers reasserts these same three arguments.[2]

Under 11 U.S.C. § 547(g), a trustee seeking to avoid an allegedly preferential transfer under § 547(b) "has the burden of proving by a preponderance of the evidence every essential, controverted element resulting in the preference." 4 Collier on Bankruptcy ¶ 547.21[5] at 547-93 (15th ed. 1993); *see, e.g., Sloan v. Zions First Nat'l Bank (In re Castletons, Inc.)*, 990 F.2d 551, 555 (10th Cir.1993) (trustee's avoidance claim rejected because "she did not satisfy her burden of proof under § 547(b)(5)"). The bankruptcy court and district court both held that the Trustee had satisfied his burden on the controverted issue of benefit under §§ 547(b)(1), (b)(4)(B) by establishing debtors' $175,000 payment to Manufacturers on the obligation guarantied by Hodges. Reviewing the bankruptcy court's underlying factual findings for clear error and its legal conclusions de novo, *see Clark v. Valley Fed. Sav. & Loan Ass'n (In re Reliance Equities, Inc.)*, 966 F.2d 1338, 1340 (10th Cir.1992), we affirm for the reasons to follow.

The benefit requirement imposed by §§ 547(b)(1), (b)(4)(B) is clearly satisfied when an insider-creditor receives a "quantifiable monetary reduction" in his financial liability to a third party for which he would have had

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[2] Manufacturers also notes its opposition to this court's prior determination that benefit to insider-guarantors can support avoidance and recovery of prepetition transfers made to outsider-creditors, pursuant to § 547(b)(4)(B). Recognition of such trilateral preferences now being law of the case, Manufacturers formally raises the issue again merely as a precaution to preserve its position in anticipation of a petition for certiorari.

only the bankruptcy estate to look to for reimbursement. *See The Travelers Ins. Co. v. Cambridge Meridian Group, Inc. (In re Erin Food Servs., Inc.)*, 980 F.2d 792, 800-01 (1st Cir.1992). Thus, "[t]here can be no question that [for purposes of the preference statute] an insider-guarantor derives measurable economic benefit from a payment on the guaranteed debt, *to the extent the insider's contingent liability on the personal guaranty is reduced.*" *Id.* at 797 (emphasis in original); *see also Levit*, 874 F.2d at 1190, 1194 (reduction in debtor's obligation to creditor diminishes financial exposure of guarantor; debtor's transfer to creditor undoubtedly produces a benefit for guarantor).

Aside from Manufacturers' legal argument that the quoted text from Hodges' guaranty precluded *any* substantive reduction in his liability, which we address and reject infra, Manufacturers does not dispute the fact that debtors' prepetition payment reduced, dollar for dollar, Hodges' liability as guarantor. Instead, Manufacturers contends that because that reduction obviously could not lift Hodges out of insolvency, he received no cognizable benefit. Manufacturers cites no pertinent authority, nor have we found any, suggesting that the otherwise undeniable economic benefit represented by an actual reduction in pecuniary liabilities somehow disappears simply because the beneficiary remains insolvent following the reduction. In practical effect, Manufacturers seeks judicial creation of a special rule exempting a whole class of (insolvent) creditor-beneficiaries from the trustee's avoidance powers. The proposed exemption runs afoul of both the spirit of § 547(b) and the counsel of common sense. Surely a creditor whose bills have been paid off – even if only in part – with a debtor's funds has been preferred

over the debtor's other creditors who have thereby been denied any opportunity to satisfy their claims from those same funds. Moreover, as a benefitted creditor is the first element of a preferential transfer claim, *see* § 547(b)(1), recognition of Manufacturers' proposed rule would raise the possibility of a potentially extensive, plainly intrusive, and utterly ancillary inquiry into the personal finances of potentially benefitted creditors whenever a trustee seeks to avoid a preference. With these considerations in mind, we refuse to graft a solvency condition onto the creditor-benefit requirement plainly stated in the statute.

Even less compelling is Manufacturers' fall-back argument that, in any event, the $175,000 reduction in Hodges' guaranty liability constituted only a de minimus benefit in light of his enormous overall debt and, as such, was insufficient to trigger the protections of § 547(b). Again, Manufacturers is left to argue a position lacking the support of pertinent authority or common sense. While we do not necessarily gainsay the possibility of a prepetition transfer of property so valueless as to render the preference provision inapposite (though, presumably, a fruitless avoidance claim would not knowingly be pursued under the circumstances), two points undercut application of such a principle here. First, in our view, the absolute value of the six-figure cash sum in question alone should preclude its characterization as de minimus, regardless of its value relative to some other particular measure. Second, if and when a comparative evaluation might be useful in resolving a truly arguable case, a de minimus finding should not be dictated by the unique financial position of the preferred creditor, or any other

entity whose idiosyncratic debt (or asset[3]) structure skews the appraisal. The value of transferred property may only be of significance – but then of real significance – to the debtor or its other, nonpreferred creditor(s). As the Trustee reminds us, "[m]aybe $175,000 is such a small amount to [Manufacturers] as to be considered a trifle, but it is anything but trifling to [debtors'] other creditors." Brief of Appellee at 7.

Finally, Manufacturers contends Hodges' liability exposure was not really reduced at all by the prepetition transfer, because under the terms of his guaranty, if the $175,000 should be returned to debtors in this avoidance proceeding, Hodges would again be liable as guarantor for that sum. The question of Hodges' benefit must be determined as of the time of the transfer, *see* 4 Collier on Bankruptcy ¶ 547.08 at 547-42 n. 4 (15th ed. 1993); *see, e.g., Taunt v. Fidelity Bank of Michigan (In re Royal Golf Prods. Corp.)*, 908 F.2d 91, 95 (6th Cir.1990), when the $175,000 reduction in his liability was a present fact and any future reversal of the situation simply a contingency. To prevail on appeal, Manufacturers must therefore establish that the mere possibility of nullification renders an executed reduction in liability an illusory benefit for purposes of § 547(b). Once again, however, Manufacturers has failed to cite pertinent supporting authority for

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[3] It bears noting that Manufacturers' reasoning would also permit a creditor to escape the trustee's avoidance powers by arguing that it was already so *wealthy* that a relatively minor prepetition transfer, preferring that creditor to perhaps far less prosperous counterparts, conferred on it no appreciable benefit.

its facially uncompelling position, which we reject for a number of reasons.

First of all, it is a patently circular attempt to bootstrap a preferential transfer out of § 547(b) – i.e., if we accept the argument and hold that Hodges did not actually benefit from the transfer because the reduction in his guaranty liability was subject to reinstatement if the Trustee prevailed on the § 547(b) claim herein, the transfer would, as a consequence of that very holding, withstand the Trustee's challenge and thereby confirm the actuality of Hodges' original benefit. On the other hand, while the Trustee's success in this proceeding will clearly deprive Hodges of the benefit he initially derived from the prepetition transfer, it is always the case that the successful pursuit of an avoidance claim nullifies the underlying benefit discriminately bestowed by the debtor on a particular creditor. That is the purpose of a § 547(b) claim. *See Johnson v. Barnhill (In re Antweil)*, 931 F.2d 689, 692 (10th Cir. 1991), *aff'd, Barnhill v. Johnson*, ___ U.S. ___, 112 S.Ct. 1386, 118 L.Ed.2d 39 (1992). Furthermore, we note that Hodges' situation was not at all unique; courts have recognized, without regard to any special guaranty language, that guarantors must make good on their guaranties following avoidance of payments previously made by their principal debtors. *See, e.g., Lowrey*, 97 B.R. at 81 (quoting and following *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 894-95 (7th Cir.1988); *Mixon v. Anderson (In re Ozark Restaurant Equip. Co.)*, 816 F.2d 1222, 1223-24 nn. 4 & 6 (8th Cir.), *cert. denied*, 484 U.S. 848, 108 S.Ct. 147, 98 L.Ed.2d 102 (1987); *In re Quality Takes Time, Inc.*, 96 B.R. 818-20 (Bankr.M.D.Tenn. 1989). Thus, acceptance of Manufacturers' argument that the benefit

requirement of § 547(b) cannot be satisfied when the preferred guarantor's reduction in liability is subject to potential reinstatement would effectively nullify the entire line of cases – including the earlier appellate decision herein – generally holding that trilateral preferences may be avoided and recovered.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: ROBINSON BROTHERS DRILLING, INC. and [sic] BROTHERS DRILLING COMPANY, Debtors.	)	
HAROLD G. LOWERY, Trustee, Appellee, v. MANUFACTURERS HANOVER LEASING CORP., Appellant, and GLOBAL FLUIDS, INC.; ABB VECTO-GRAY, INC., formerly known as GRAY TOOL COMPANY; FIRST NATIONAL BANK OF BETHANY, OKLAHOMA; HALLIBURTON COMPANY; J.D. HODGES; ITT COMMERCIAL FINANCE CORPORATION; LOR, INC.; PONDER FISHING TOOLS, INC., Creditors.	)	No. 93-6016

ORDER

(Filed Oct. 29, 1993)

Before LOGAN and BRORBY, Circuit Judges, and KANE,* District Judge.

This matter is before the court on appellant's petition for rehearing.

The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/ Patrick Fisher
By Patrick Fisher
Chief Deputy Clerk

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*Honorable John L. Kane, Jr., Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

IN THE UNITED STATE BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING COMPANY,	) No. BK-83-1962-A) (Chapter 11)) (Substantively) Consolidated)
Debtors.	)
HAROLD G. LOWREY, CHAPTER 11 TRUSTEE FOR THE ESTATES OF THE DEBTORS,	) Adv. No. 86-0252
Plaintiff,	)
vs.	)
FIRST NATIONAL BANK OF BETHANY, ET AL.,	)
Defendants.	)

ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT

(Filed Jan. 11, 1988)

This matter comes on for hearing on the Motion for Summary Judgment of Defendants, Gray Tool Company, Halliburton Company, ITT Commercial Finance Corp., LOR, Inc., Manufacturers Hanover Leasing Corp. and Ponder Fishing Tools, Inc. Plaintiff, Harold G. Lowrey, appeared by and through his counsel, Gary L. Morrissey of Kenan & Peterson, and defendants, Gray Tool Company appeared by and through its counsel, Robert N. Sheets of McFall McVay Sheets Lovelace & Juras, Halliburton Company appeared by and through its counsel, Doneen Douglas Jones of Fellers, Snider, Blankenship,

Bailey & Tippens, P.C., ITT Commercial Finance Corporation appeared by and through its counsel, John Decker, Manufacturing Hanover Leasing Corporation appeared by and through its counsel, James W. Vogt of Reynolds, Riding & Hargis, and Ponder Fishing Tools, Inc. appeared by and through its counsel, R. Bruce Kerr of Mahaffey & Gore.

The Court, having heard the statements of counsel, having reviewed the pleadings filed herein and being fully advised in the premises, finds that all parties hereto have stipulated that no issues of material fact exist and that the Trustee, under these circumstances, cannot utilize 11 U.S.C. §550(a) to recover payments received by defendants who hold guarantees of J. D. Hodges, an insider of debtor, outside of the 90 day period and within one year of the filing of the bankruptcy. Furthermore, the Court finds that a reading of 11 U.S.C. §550(a) does not indicate that Congress explicitly intended to circumvent 11 U.S.C. §547 by permitting recovery for transfers outside of the 90 day period and within one year from non-insider creditors. Based upon the ambiguities in 11 U.S.C. §550, the Court must consider the equities involved. A review of the equitable considerations and long settled credit practices involving guarantees, mitigates against permitting recovery from the non-insider creditors.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion for Partial Summary Judgment is hereby granted and that Defendants, Gray Tool Company, Halliburton Company, ITT Commercial Finance Corporation, LOR, Inc., Manufacturers Hanover Leasing Corporation and Ponder Fishing Tools, Inc., have judgment in their favor for all monies received between 90

days and one year prior to the filing of the bankruptcies of Robinson Brothers Drilling, Inc. and Robinson Brothers Drilling Company.

/s/ Richard L. Bohanon
Richard L. Bohanon
United States Bankruptcy Judge

ENTERED ON JUDGMENT DOCKET

JAN 11 1988

APPROVED:

/s/ Doneen Douglas Jones
Doneen Douglas Jones
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, P.C.
2400 First National Center
Oklahoma City, Oklahoma 73102

Attorneys for Defendant, Halliburton Company

/s/ James Vogt
James W. Vogt
REYNOLDS, RIDINGS & HARGIS
2808 First National Center
Oklahoma City, Oklahoma 73102

Attorneys for Defendant, Manufacturing Hanover Leasing Corporation

/s/ Robert N. Sheets
Robert N. Sheets
McFALL McVAY SHEETS LOVELACE
& JURAS, P.C.
Suite 303, 101 N.W. 63rd St.
Oklahoma City, Oklahoma 73116

Attorneys for Defendant,
Gray Tool Company

/s/ Gary L. Morrissey
Gary L. Morrissey
Kenan & Peterson
Suite 202, 511 Couch Drive
P.O. Box 2036
Oklahoma City, Oklahoma 73102

Attorneys for Plaintiff,
Harold G. Lowrey, Trustee

UNITED STATE BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

IN RE: BK-83-1962-BH	
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING COMPANY,	ADV. PRO. NO. 86-0251
Debtor.	
HAROLD G. LOWREY, TRUSTEE,	
Plaintiff.	
v.	
FIRST NATIONAL BANK OF BETHANY; GLOBAL FLUIDS, INC.; GRAY TOOL COMPANY; HALLIBURTON CO.; J.D. HODGES; ITT COMMERCIAL FINANCE CORP.; LOR, INC.; MANUFACTURERS HANOVER LEASING CORP.; PONDER FISHING TOOLS, INC.; and VINSON SUPPLY CO.,	
Defendants.	

SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW

(Filed FEB 19 1991)

At the end of the trial in this proceeding certain findings of fact and conclusions of law were entered into the record pursuant to Bankruptcy Rule 7052. It was determined generally that the plaintiff was insolvent at

the time of all the transfers in question; that J.D. Hodges, the debtor's chief executive, principal shareholder and guarantor of the debts in question, knew or had reasonable cause to believe it was insolvent from and after July 5, 1982; that the transfers in issue were not made in the ordinary course of business of Robinson Brothers; that the insider-guarantor, Hodges benefitted from the transfers to defendants Vinson and Ponder; that the defendants received more than they would have received if the case were a case under chapter 7 of title 11; and that the debts of the defendants holding promissory notes were incurred when the notes were executed and delivered to them.

Additionally, at the end of the plaintiff's case in chief his claims against Manufacturers Hanover Leasing Corp. arising from payments by Nova Energy, Inc. were dismissed pursuant to Bankruptcy Rule 7041 upon the conclusion that Manufacturers did not waive its security interest in the accounts receivable and it further was held that Gray Tool Co. was estopped to deny validity of the signature of J.D. Hodges appearing on its promissory note.

I further find that the payments in question to the remaining defendants all were on account of antecedent debts owed by the debtor before the respective transfers were made.

These supplemental findings and conclusions now address the remaining issues relating to the Manufacturers Hanover Leasing Corp., Gray Tool Company, Halliburton Co., Ponder Fishing Tools, Inc., and Vinson Supply Co.

ISSUES CONCERNING MANUFACTURERS HANOVER LEASING CORP.

Manufacturers loaned the debtor approximately $6,500,000 with which it acquired several drilling rigs and a helicopter. It granted MHLC a security interest in the equipment and accounts receivable arising from the rigs and its notes were guaranteed by Hodges. Since the collateral eventually proved to be worth substantially less than the debt MHLC was an undersecured creditor.

The primary issue remaining is whether the payments RBD made to MHLC reduced Hodges' exposure as a guarantor under the terms of the guaranties held by MHLC. Each of the guaranties provides that:

> This Guaranty shall continue to be effective, or be reinstated, as the case may be, if at any time payment, or any part thereof, of any of the obligations is rescinded or must otherwise be restored or returned by the lender upon the insolvency, bankruptcy or reorganization of the borrower or otherwise, all as though such payment had not been made.

MHLC says that the effect of this is that the payments it received were not "for the benefit of a creditor" (Hodges) as required by § 547(b) (1)[1] for he received no benefit because he continues to have liability for the full amount due to the quoted language. In order for the trustee to be able to recover the funds transferred he

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[1] All references to 11 U.S.C. § 547 are to the version in effect at the time of the transfers which form the basis of the complaint.

must show that Hodges was a creditor; and that he benefitted from the payments. I conclude that he was a creditor within the meaning of § 101(9) of the Code for he certainly was a guarantor of the MHLC obligations. *See Lowrey v. First National Bank of Bethany*, 97 B.R. 77 (W.D. Okla. 1988) affirmed *Manufacturers Hanover Leasing Corp., et al. v. Lowrey*, 892 F.2d 850 (10th Cir. 1989). *See also Collier on Bankruptcy* ¶ 547.04[1]. The argument still is made that he did not benefit from the payments debtor made to MHLC. While this theory sounds convincing on its face it begs the purpose of the entire preferential avoidance scheme of the Bankruptcy laws. And, there is no crystal ball that can tell what the future will bring – it may well be that for a multitude of unforseen [sic] and unforeseeable reasons if MHLC is required to repay the transfer that Hodges may never make good on the guaranty and perforce will have benefitted from the payments his company made to MHLC. In any event he has had a "benefit" for the period of time since the payments were made for MHLC has not called upon him to perform his guaranty for some 7 or 8 years.

The "benefit" issue was discussed in the much debated *Deprizio* case where it says:

> The outsiders who must kick into the pool when the trustee uses the avoiding powers retain their contractual entitlements; all the trustee's recovery does is ensure that those entitlements (as modified by any statutory priorities) – rather than the efforts of insiders to protect their own interests, or the cleverness of outsiders in beating the 90-day deadline – determine the ultimate distribution of the debtor's net assets. *Levit v.*

Ingersoll Rand Financial Corp., 874 F.2d 1186, 1195 (7th Cir. 1989) (Emphasis supplied.)

This holding shows that the courts adopt an extremely strict approach when viewing payments to creditors whose debts are guaranteed by insiders and will repudiate "clever" attempts to evade the trustee's avoidance powers in such circumstances. *Deprizio* has been followed by the Court of Appeals for this Circuit in this very proceeding. *See Manufacturers Hanover Leasing Corp., et al. v. Lowrey,* 892 F.2d 850 (10th Cir. 1989). While this may not be the law of the case on this issue as argued by the trustee it is a strong indication of the direction the Court of Appeals is taking in insider guarantee cases. To hold that these payments did not benefit Hodges due to the contractual language would permit every creditor holding guaranties to avoid liability for preferential payments by using the identical language. In following *Deprizio* the Court of Appeals clearly indicates that this result would be unacceptable.

Accordingly I conclude that Hodges did benefit from the payments to MHLC with the meaning of § 547(b)(1). Since MHLC is an undersecured creditor it received, as a result of these payments, more than it would have received if the case were in chapter 7, which is nothing.

It previously was held that the payments were made more that [sic] 45 days after the debts were incurred, which was the date of execution and delivery of the notes.

The trustee, therefore, can avoid the transfers and recover the amounts paid from MHLC.

ISSUES CONCERNING HALLIBURTON CO.

Halliburton also argues that Hodges is not a creditor of the debtor but that issue is dealt with in the preceding section and it is concluded that Hodges is a creditor within the defined meaning of that term. Its argument that Hodges did not benefit from the payments also is answered above.

Halliburton does make a unique argument concerning whether it received more than it would have received if the case were one under chapter 7. It appears that Halliburton's claim was partially secured for it held statutory liens on some good oil and gas working interests. The evidence shows that when it received the debtor's notes it "booked" the debt as partially secured and partially unsecured. For valid income tax reasons it "charged off" the unsecured portion. The complained of payments were then applied to the secured portion of the debt. In the event the case had been in chapter 7 Halliburton would have realized on its statutory liens to the extent of the amounts received. It argues from these facts that it, therefore, did not receive more than would have been paid to it in Chapter 7.

The trustee relies upon authority holding that, under such circumstances, it is presumed that receipts by a creditor are applied toward the unsecured or unsecured portion of the debt. *See Drabkin v. A.I. Credit Corporation*, 800 F.2d 1153, 1157 (D.C. Cir. 1986). That may be sound law but here the presumption is effectively rebutted by Halliburton. The credible evidence is ~~that it applied~~ the

receipts to the secured portion of the debt for valid business reasons without seeking to defeat the potential preferential aspects of the transfer. If the estate had been liquidated in chapter 7 Halliburton would have been entitled to realize upon its liens at least to the extent of the payments received.

The trustee argues that had Halliburton sought to foreclose on its liens it would have sued for the full amount owed to it, both secured and unsecured. Such may well be the case but still does not answer the issue presented here.

Since Halliburton did not receive more than it would have had upon liquidation the trustee's complaint against it must fail and be dismissed.

ISSUES CONCERNING VINSON SUPPLY CO.

Vinson has sold pipe to the debtor and filed statutory liens against wells operated by it for approximately $1,000,000. These liens affected 100% of the working interest in these leases. Subsequently the parties agreed that Vinson would have $100,000 and a note from RBD for the remaining amount of the debt to be paid in installments secured by RBD's working interest in the leases. Hodges guaranteed this note and Vinson released its statutory liens. It did not, however, perfect its mortgages until well after the bankruptcy petition was filed. The trustee sues for the two $100,000 payments made to Vinson pursuant to this guaranteed note.

To the extent Vinson raises issues addressed previously, such as whether RBD was insolvent, was Hodges a

creditor, did he receive a benefit, etc. the findings and conclusions are not repeated.

It does contend that it did not receive more than it would have received in a case under chapter 7. This argument fails since the mortgage liens were not perfected until after the bankruptcy and Vinson, thus, would not have held a secured claim. Because of the failure to perfect the liens the trustee could have avoided them under § 544 and the late perfection is a void act for being in violation of the automatic stay imposed by § 362. Furthermore, there are no considerations that might result in a holding that Vinson should be granted an equitable lien. It and RBD may have intended for the debt to be secured but, for reasons of its own, Vinson failed to perfect and thus lost the contemplated benefit. It is just such "secret" liens that are intended to be avoided by § 544.

Vinson also argues that the payment and its release of the statutory lien was a contemporaneous exchange for new value exempting the transfer under § 547(c) (1). The fact is, however, that an open account was converted to a promissory note – a new obligation was substituted for an existing one. Section 547(a) (2) says specifically that "new value . . . does not include an obligation substituted for an existing one." Vinson's reliance upon *Kenan v. Fort Worth Pipe Company*, 792 F.2d 125 (10th Cir. 1986) is misplaced for the facts are totally different. In *Kenan* the lien was released upon *payment* of the full amount of the debt – there was no substitution of one obligation for another. In the bankruptcy context, substitution is not the granting of new value and Vinson's argument falls. This conclusion is reached without valuing the liens Vinson held

upon wells which subsequently were plugged and abandoned.

It also contends that its statutory lien was "inchoate" and its relinquishment constituted new value. The basis for this argument is that at the time of the release Vinson still was within the statutory time to file a new lien on the leases to which it supplied pipe. Such may be the case but the fact remains that here we have a substitution of obligations within the § 547(a) (2) exception, not a forbearance in return for payment. Vinson simply cannot change the facts from what they are to what it might like them to be.

Accordingly I conclude that the trustee is entitled to avoid the transfers to Vinson and recover the amounts paid to it.

ISSUES CONCERNING PONDER FISHING TOOLS, INC.

Ponder provided services to RBD's Cody well and filed a statutory lien against the lease for almost $135,000. In June, 1983 RBD paid Ponder $57,000 for a release of the working interests of third parties.[2] It continued to have its lien against RBD's working interest. The Cody well subsequently was plugged and abandoned.

Ponder argues that the $57,000 payment is within the "contemporaneous exchange for new value" exception contained in § 547(c) (1). This argument, however, cannot

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[2] Since RBD paid the $57,000 to Ponder within the 90 days before the date of filing the petition it is not pertinent that Hodges did not guarantee the Ponder debt.

hold for to be within the exception the new value must be "given to the debtor." Here the payment was made to a lawyer and paid on to the third parties. The proof shows that RBD received no benefit from the payment even though the others paid what they owed it when Ponder delivered the release. The net effect of the transaction did not result in any benefit to RBD but rather a diminution of the estate.

Ponder also argues that the exception of § 546(c) (6) applies to it. This provision excepts a transfer which is the fixing of a statutory lien caused by its relation back to a previous date. The argument does not apply here for Ponder continued to have its statutory lien on the interest of RBD in the Cody well and RBD did not benefit from the transaction.

By receiving the payment Ponder received more than it would have had in a case under chapter 7 where it would have received nothing since its secured claim against RBD would have had no value and it had no unsecured claim against the non-operator working interest owners.

It also is insignificant that the trustee has not sought to recover from the other Cody interest owners for they were not paid with estate funds.

ISSUES CONCERNING GRAY TOOL COMPANY

In early 1983 Gray owed RBD for services and delivered a note for $100,000 to it. Subsequently RBD paid $42,500 on this note in two separate payments. Hodges name appears as a co-maker.

Gray initially argues that since the signature of Hodges is apparently not his that it should be relieved from liability for any preferential payment. However, after the bankruptcy, Gray sued on the note and obtained an agreed judgment. It previously has been concluded that Hodges and Gray are estopped from denying validity of the note at this late date. Abundant evidence was received to show that it was not uncommon for Hodges to authorize others within the RBD organization to sign his name to various corporate and personal instruments and the parties cannot not [sic] now take inconsistent positions on the same issue in related litigation. *U.S. v. 49.01 Acres of Land*, 802 F.2d 387 (10th Cir. 1986). *And see Ellis v. Arkansas Louisiana Gas Co.*, 609 F.2d 436 (10th Cir. 1979); 15 O.S. § 75; and *Appleman v. Pepis*, 246 P.2d 255 (Okla. 1926).

Gray also argues that since Hodges is a co-maker rather than a guarantor that he is not entitled to contribution until he has paid more than his proportionate share of the indebtedness. It would then follow that he is not a creditor of the estate and the payment would thus not be preferential. It is bankruptcy law not state law that controls the determination of whether payments are preferential. It remains that "[a] guarantor or surety for the debtor, or an endorser of notes or checks will be a creditor under the Code . . . " *Collier on Bankruptcy* ¶ 547.04[1]. If, due to the circumstances of the way the note was drawn in this particular case Hodges is not a "guarantor" he is a surety or an endorser and thus a "creditor" for preference purposes.

Finally Gray argues that since he had guaranteed over $100,000,000 of RBD obligations that Hodges was so

hopelessly insolvent that the payment could not have benefitted him. The fact remains, however, that once RBD paid the $42,500 to Gray, Hodges was relieved of that much liability to it and this credit was recognized by Gray when it sued him. Hodges thus benefitted from the payment regardless of whether or not he was solvent.

From the above I conclude that the plaintiff-trustee is entitled to recover the $42,500 transferred to Gray.

CONCLUSION

The trustee is directed to submit his proposed form of judgment in accordance with the Findings of Fact and Conclusions of Law entered into the record and supplemented here within 7 days.

Dated: February 19, 1991

By the Court.

/s/ Richard L. Bohanon
Richard L. Bohanon
United States Bankruptcy
Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

IN RE: BK-83-1962-A	:	
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING CO.,	:	ADV. PRO. NO.
Debtors.	:	86-0251
HAROLD G. LOWREY, TRUSTEE,	:	
Plaintiff.	:	
vs.	:	
FIRST NATIONAL BANK OF BETHANY; GLOBAL FLUIDS, INC.; GRAY TOOL CO.; HALLIBURTON CO.; J.D. HODGES; ITT COMMERCIAL FINANCE CORP.; LOR, INC.; MANUFACTURERS HANOVER LEASING CORP.; and PONDER FISHING TOOLS, INC.;	:	
and	:	
VINSON SUPPLY COMPANY,	:	
Defendants.	:	

JUDGMENT

(Filed Feb. 22, 1991)

Pursuant to the findings of fact and conclusions of law entered by this court on February 15, 1991 and supplemented in writing on February 19, 1991, judgment is

hereby entered for the plaintiff against Vinson Supply Company in the principal amount of $200,000; against Ponder Fishing Tools, Inc. in the principal amount of $57,000; against Gray Tool Co. in the principal amount of $42,500 and against Manufacturer's Hanover Leasing Corp. in the principal amount of $175,812.50, with his costs and interest at 6.62%.

This judgment is entered without prejudice to plaintiff's request for prejudgment interest which will be heard in regular course.

DATED: February 22, 1991

By the Court.

/s/ Richard L. Bohanon
Richard L. Bohanon
U.S. Bankruptcy Judge

ENTERED ON JUDGMENT DOCKET: FEB 22 1991

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING COMPANY,	)	No. 83-1962-A (Chapter 11)
	)	
Debtors.	)	
	)	Consolidated
HAROLD G. LOWERY, CHAPTER 11 TRUSTEE for the Estate of the Debtors,	)	
	)	
	)	ADV. PRO. NO. 86-251
Plaintiff,	)	
	)	
vs.	)	
	)	
FIRST NATIONAL BANK OF BETHANY; GLOBAL FLUIDS, INC.; GRAY TOOL COMPANY; HALLIBURTON CO.; J. D. HODGES, an individual; ITT COMMERCIAL FINANCE CORP.; LOR, INC.; MANUFACTURERS HANOVER LEASING CORP.; and PONDER FISHING TOOLS, INC.,	)	
	)	
and	)	
	)	
VINSON SUPPLY COMPANY,	)	
	)	
Defendants.	)	

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 09, 1991)

This matter comes on for review by the Court on the Combined Motion To Amend Findings Of Fact And To

Alter Or Amend Judgment filed by Manufacturers Hanover Leasing Corporation ("MHLC") and the Motion To Amend Findings Of Fact filed by Halliburton Company ("Halliburton").

After reviewing the Motions and listening to arguments of counsel, the Court finds that the Motions of MHLC and Halliburton should be sustained and that the Court should enter additional findings of fact and amend the Judgment.

ISSUES CONCERNING MHLC, HALLIBURTON AND VINSON SUPPLY

In supplementing the findings of fact the Court finds that in addition to Gray Tool Company, MHLC, Halliburton and Vinson Supply Company ("Vinson") contended that J. D. Hodges ("Hodges") was hopelessly insolvent, and therefore, the payments by Robinson Brothers to MHLC and Halliburton could not have benefitted Hodges.

The Court further finds that MHLC Exhibit 60 is a Personal Financial Statement of Hodges dated September 30, 1982. This Financial Statement valued Hodges' interest in Robinson Brothers at $30,000,000.00. Since this Court previously determined that Robinson Brothers was substantially insolvent on July 5, 1982, the Court finds that Robinson Brothers had no value to Hodges as of July 5, 1982, and the $30,000,000.00 value for 73% interest in Robinson Brothers should be excluded from Hodges' Personal Financial Statement. The Court further finds that this Financial Statement does not include any contingent liabilities relating to any debts of Robinson Brothers that

Hodges personally guaranteed which exceeded $100,000,000.00.

Thus, without taking into consideration any of Hodges' other assets listed on the Financial Statement dated September 30, 1982, many of which the Court notes are companies that have either filed bankruptcy or gone out of business, the Court finds that Hodges' assets should be reduced to $25,668,066.21, and his liabilities should be increased to $121,911,245.24. Accordingly, Hodges had a negative net worth of at least $96,243,179.03 during the year preceding the bankruptcy of Robinson Brothers. Nevertheless, as this Court previously determined, the payments to MHLC, Halliburton, Gray Tool Company and Vinson reduced Hodges' liability on his guaranty and, thus, he received a benefit.

The Court further finds that there was no evidence presented at trial or considered by this Court that these Defendants who held guaranties from an insider (Hodges) were preferred over other creditors of Robinson Brothers who did not hold guaranties from an insider of Robinson Brothers. However, the Court finds that under the facts and evidence presented, the Trustee satisfied each applicable element of Section 547(b) so as to allow judgment to be entered against MHLC, Ponder Fishing Tools, Inc., Gray Tool Company and Vinson Supply Co.

ISSUES CONCERNING HALLIBURTON

The Court further finds that the second note executed by Robinson Brothers and guaranteed by Hodges was not in existence when the payment to Halliburton was made. However, the Court need not reach the effect of this

finding based on the Court's ruling in favor of Halliburton on February 19, 1991.

An Amended Judgment will be filed commensurate with the filing of these Supplemental Findings of Fact.

DATED: May 9, 1991

/s/ Richard Bohanon
United States
Bankruptcy Judge

APPROVED:

/s/ James Vogt
James Vogt – 009243
Reynolds & Ridings
Attorneys for Defendant,
Manufacturers Hanover
Leasing Corporation
2808 First National Center
Oklahoma City, OK 73102
405/232-8131

/s/ Gary L. Morrissey
Gary L. Morrissey
Krasnow & Williams
Attorneys for Plaintiff,
Harold G. Lowrey, Trustee
300 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102

/s/ Deborah S. Black
Robert N. Sheets
Phillips, McFall, McVay,
Sheets & Lovelace
Attorneys for Defendant,
Gray Tool Company
1001 N.W. 63rd, Suite 205
Oklahoma City, OK 73116

/s/ Doneen Douglas Jones
Doneen Douglas Jones
Fellers, Snider, Blankenship,
Bailey & Tippens
Attorneys for Defendant,
Halliburton Co.
2400 First National Center
Oklahoma City, OK 73102

/s/ R. Bruce Kerr
Bruce R. Kerr
Mahaffey & Gore
Attorneys for Defendant,
Ponder Fishing Tools, Inc.
211 N. Robinson Avenue
Suite 1100
Oklahoma City, OK 73102

/s/ Ray G. Moss
Ray G. Moss
Daugherty, Bradford, Fowler &
Moss, P.C.
Attorneys for Defendant,
Vinson Supply Co.
900 City Place
204 North Robinson Avenue
Oklahoma City, OK 73102

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING COMPANY,	No. 83-1962-A (Chapter 11)
Debtors.	
HAROLD G. LOWERY, CHAPTER 11 TRUSTEE for the Estate of the Debtors,	Consolidated
Plaintiff,	ADV. PRO. NO. 86-251
vs.	
FIRST NATIONAL BANK OF BETHANY; GLOBAL FLUIDS, INC.; GRAY TOOL COMPANY; HALLIBURTON CO.; J. D. HODGES, an individual; ITT COMMERCIAL FINANCE CORP.; LOR, INC.; MANUFACTURERS HANOVER LEASING CORP.; and PONDER FISHING TOOLS, INC.,	
and	
VINSON SUPPLY COMPANY,	
Defendants.	

AMENDED JUDGMENT

(Filed May 09, 1991)

The above-styled matter comes on for review of the Combined Motion For Additional Findings Of Fact And To Alter Or Amend Judgment filed by Manufacturers

Hanover Leasing Corp. and the Motion to Amend Findings of Fact filed by Halliburton Co. After reviewing the Motions, listening to arguments of counsel, and being duly advised in the premises, the Court finds that said Motions should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against the defendant, Vinson Supply Company, in the principal amount of $200,000.00; against Ponder Fishing Tools, Inc., in the principal amount of $57,000.00; against Gray Tool Company in the principal amount of $42,500.00; and against Manufacturers Hanover Leasing Corp. in the principal amount of $175,812.50; with interest on each of these respective amounts to be at 6.62% from the date of judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against the defendant, J. D. Hodges, in the amount of $475,312.50.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff's request for pre-judgment interest is denied and the plaintiff's request for costs shall be determined in accordance with the further orders of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Manufacturers Hanover Leasing Corp. shall have judgment against J. D. Hodges in the amount of $175,812.50 with interest at 6.62% from date of judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered for Halliburton Co. against plaintiff.

Dated: MAY 9 1991.

/s/ Richard Bohanon
United States
Bankruptcy Judge

ENTERED ON JUDGMENT DOCKET

MAY 09 1991

Amended Judgment
In Re Robinson Brothers
Adv. Pro. No. 86-251
Signature Page

/s/ James Vogt
James Vogt – 009243
Reynolds & Ridings
Attorneys for Defendant,
Manufacturers Hanover
Leasing Corporation
2808 First National Center
Oklahoma City, OK 73102
405/232-8131

/s/ Gary L. Morrissey
Gary L. Morrissey
Krasnow & Williams
Attorneys for Plaintiff,
Harold G. Lowrey, Trustee
300 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102

/s/ Robert Sheets
Robert N. Sheets
Phillips, McFall, McVay,
Sheets & Lovelace
Attorneys for Defendant,
Gray Tool Company
1001 N.W. 63rd, Suite 205
Oklahoma City, OK 73116

/s/ Doneen Douglas Jones
Doneen Douglas Jones
Fellers, Snider, Blankenship,
Bailey & Tippens
Attorneys for Defendant,
Halliburton Co.
2400 First National Center
Oklahoma City, OK 73102

/s/ R. Bruce Kerr
Bruce R. Kerr
Mahaffey & Gore
Attorneys for Defendant,
Ponder Fishing Tools, Inc.
211 N. Robinson Avenue
Suite 1100
Oklahoma City, OK 73102

/s/ Ray G. Moss
Ray G. Moss
Daugherty, Bradford, Fowler &
Moss, P.C.
Attorneys for Defendant,
Vinson Supply Co.
900 City Place
204 North Robinson Avenue
Oklahoma City, OK 73102

IN THE UNITED STATE BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	No. BK-83-1962-A
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING COMPANY,	)	(Chapter 11)
Debtors.	)	
HAROLD G. LOWREY, Chapter 11 Trustee for the Estate of the Debtors,	)	Adv. No. 86-0251
Plaintiff,	)	
v.	)	
FIRST NATIONAL BANK OF BETHANY; GLOBAL FLUIDS, INC.; GRAY TOOL COMPANY; HALLIBURTON CO.; J.D. HODGES, an individual; ITT COMMERCIAL FINANCE CORP.; LOR, INC.; MANUFACTURERS HANOVER LEASING CORP.; and PONDER FISHING TOOLS, INC.,	)	
and	)	
VINSON SUPPLY, CO.,	)	
Defendants.	)	

AMENDED JUDGMENT

(Filed MAY 24 1991)

The judgment of March 5, 1991, and the amended judgment of May 9, 1991, should be further amended to dispose of the cross claim of Halliburton Company

against J.D. Hodges. This judgment incorporates the judgment and amended judgment previously entered and

IT IS FURTHER ORDERED that Halliburton Company recover nothing herein on its cross claim against Defendant, J.D. Hodges, and based upon this Court's entry of judgment in favor of Halliburton Company against the Trustee, Halliburton Company is not entitled to judgment against Defendant, J.D. Hodges.

DATED: MAY 24 1991

/s/ Richard L. Bohanon
Richard L. Bohanon
United States Bankruptcy
Judge

ENTERED ON JUDGMENT
DOCKET

MAY 24 1991

APPROVED:

/s/ Doneen Douglas Jones
Doneen Douglas Jones – OBA #4762
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS, P.C.
120 N. Robinson, Suite 2400
Oklahoma City, OK 73102-7875
(405) 232-0621

Attorneys for Defendant,
Halliburton Company

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBINSON BROTHERS DRILLING, INC. and ROBINSON BROTHERS DRILLING COMPANY,	)	
Debtors,	)	Case Nos.
HAROLD G. LOWREY, TRUSTEE,	)	CIV-91-874-R
Appellee and Cross-Appellant,	)	CIV-91-998-R
vs.	)	CIV-91-1154-R
MANUFACTURERS HANOVER LEASING CORP.,	)	
Appellant and Cross-Appellee.	)	

ORDER

(Filed DEC 10 1992)

This appeal and cross-appeal arises from an adversarial proceeding brought by Harold G. Lowrey, Trustee ("Trustee"), against Manufacturers Hanover Leasing Corp. ("Manufacturers") to avoid, as preferential transfers under 11 U.S.C. § 547(b), certain payments made to Manufacturers by Robinson Bros. Drilling, Inc. and Robinson Bros. Drilling Company ("Debtors") between a period of 90 days and one year before the Debtors' bankruptcy petition was filed.[1] Manufacturers denied that the transfers were avoidable arguing that J.D. Hodges, an insider-creditor of the Debtors, derived no benefit from the transfers and received no more from the transfers

[1] The Court has jurisdiction over the appeal and cross-appeal under 28 U.S.C. § 158(a).

than he would have received in a chapter 7 liquidation. At trial, the bankruptcy court held that the transfers to Manufacturers were avoidable and entered judgment in favor of the Trustee in the amount of $175,812.50. The bankruptcy court, however, denied the Trustee's request for prejudgment interest.

In reviewing the bankruptcy court's decision, the district court must accept the bankruptcy court's factual findings unless they are clearly erroneous. *In re Mullet*, 817 F.2d 677, 678 (10th Cir. 1987). By comparison, questions of law are reviewed *de novo* by the district court. *Id.* at 679. If the bankruptcy court's legal conclusions are drawn from undisputed evidence, the district court may make an independent determination from the bankruptcy court's conclusions. *In re Golf Course Builders Leasing, Inc.*, 768 F.2d 1167, 1169 (10th Cir. 1985).

Manufacturers contends that the bankruptcy court erred in finding that the transfers to Manufacturers were made "to or for the benefit" of J.D. Hodges. See, 11 U.S.C. § 547(b)(1). It asserts that the evidence presented at trial revealed that J.D. Hodges personally guaranteed over $100,000,000.00 in debts of the Debtors and that J.D. Hodges could not respond on his guaranties. Manufacturers also asserts that the evidence revealed that J.D. Hodges had a negative worth of at least $96,243,179.03 during the year preceding bankruptcy. Because J.D Hodges' negative worth was so great and the payments to Manufacturers only reduced J.D. Hodges' negative worth by $175,812.50, Manufacturers argues that J.D. Hodges did not benefit from the payments or if he did,

the benefit was so minimal that it should not be recognized under the rule of *de minimis non curat lex*. Consequently, Manufacturers argues that the payments do not constitute preferential transfers and are not avoidable under § 547(b).

In the Court's view, the transfers to Manufacturers benefitted J.D. Hodges. The Court concludes that the payments to Manufacturers were an improvement in the debt of J.D. Hodges. Although the improvement was slight, the Court concludes that such improvement was sufficient for purposes of § 547(b)(1). Therefore, the Court concludes that the Trustee proved § 547(b)(1) as to J.D. Hodges.

The Court also rejects Manufacturers' argument that J.D. Hodges' debt was not actually improved because he would remain liable as a guarantor for the payments upon avoidance by the Trustee. The Court concludes that for purposes of § 547(b)(1), the benefit to the insider-creditor should be determined at the time of the transfer. 4 *Collier on Bankruptcy*, § 547.08 n. 4 (15th ed. 1992). Thus, subsequent events such as the avoidance of the payments by the Trustee should not be taken into consideration. In this case, J.D. Hodges' liability to Manufacturers was reduced by $175,812.50 at the time the transfers were made. Therefore, the Court concludes that the transfers were "for the benefit" of J.D. Hodges and satisfy § 547(b)(1).

Manufacturers next contends that the bankruptcy court erred in determining for purposes of § 547(b)(5) whether or not Manufacturers received more from the transfers than what it would have received if the case

were under chapter 7. It argues that the bankruptcy court should have determined whether or not J.D. Hodges received more from the transfers than he would have received in a case under chapter 7. Manufacturers argues that had such determination been made, the bankruptcy court would have found that the § 547(b)(5) was not satisfied because J.D. Hodges received nothing from the transfers.

The Court agrees with Manufacturers that the Trustee must prove the requirement of § 547(b)(5) as to J.D. Hodges in order to avoid the transfers to Manufacturers. *See, In re C-L Cartage Co., Inc.*, 899 F.2d 1490, 1493 (6th Cir. 1990). And although the. bankruptcy court did not consider the issue of whether or not J.D. Hodges would have received more from the transfers than in a chapter 7 liquidation, the Court concluded that the issue need not be remanded for consideration. Both Manufacturers and the Trustee agree that J.D. Hodges would have received nothing in chapter 7. However, the Court concludes that J.D. Hodges did receive a benefit from transfers. Therefore, because J.D. Hodges did receive more from the transfers than in a chapter 7 liquidation, § 547(b)(5) has been satisfied.

In addition, Manufacturers argues that § 547 and § 550 of the Bankruptcy Code do not permit the Trustee to avoid transfers made to non-insider creditors between 90 days and one year preceding the bankruptcy petition date. This issue was addressed and decided in *In re Robinson Brothers Drilling, Inc.*, 97 B.R. 77 (W.D. Okla. 1988), *aff'd*, 892 F.2d 850 (10th Cir. 1989). The Court will not address the issue again.

On cross-appeal, the Trustee contests the bankruptcy court's denial of prejudgment interest on the preferential payments. The Trustee argues that the current trend of case law is to award prejudgment interest to a trustee who successfully overturns preferential transactions.

The Bankruptcy Code does not specifically provide for an award of prejudgment interest in the recovery of preferential transfers. *In re Investment Bankers, Inc.*, 136 B.R. 1008, 1023 (Bankr. D. Colo. 1989). The decision to award prejudgment interest in a preferential transfer action is therefore left to the sound discretion of the bankruptcy court. *In re Art Shirt Ltd., Inc.*, 93 B.R. 333, 342 (Bankr. E.D. Pa. 1988). The bankruptcy court, in this case, denied prejudgment interest on the basis that the delay in the proceedings was not caused by either party and because the request for prejudgment interest was not included in the final pretrial order. Under the facts in this case, the Court cannot find that the bankruptcy court abused its discretion.

Finally, the Court agrees with Manufacturers that the appeal in CIV-91-874-R is premature. In litigation involving multiple defendants, a judgment is not final until the case has been disposed on all issues raised among all litigants. Bankruptcy Rule 7054. Because all issues between all parties were not disposed of until the judgment entered on May 24, 1991, the Court concludes that the appeal taken from the judgment entered on February 22, 1991 should be dismissed as premature.

Based upon the foregoing, the bankruptcy court's decisions for which appeals CIV-91-998-R and CIV-91-1154-R were filed are hereby AFFIRMED. The

appeal in CIV-91-874-R is hereby DISMISSED as premature.

ENTERED this 10th day of December, 1992.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT
JUDGE

ENTERED IN JUDGEMENT
DOCKET ON 12-10-92

BANKRUPTCY CODE

11 U.S.C. § 547. Preferences

* * *

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer –

(1) to the extent that such transfer was –

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was –

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor –

(A) to the extent such security interest secures new value that was –

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of –

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title; or

(7) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

* * *

MOTION FILED
FEB 15 1994

(2)

No. 93-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MANUFACTURERS HANOVER LEASING CORPORATION,
Petitioner,

v.

HAROLD G. LOWERY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE EQUIPMENT LEASING ASSOCIATION OF AMERICA, INC., SUPPORTING THE GRANTING OF THE PETITION FOR CERTIORARI

ELLIS LYONS
(Counsel of Record)
BENNETT BOSKEY
EDWARD A. GROOBERT
VOLPE, BOSKEY AND LYONS
918 16th Street, N.W., Suite #602
Washington, D.C. 20006
(202) 737-6580

Attorneys for Equipment Leasing Association of America, Inc.

February 1994

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8 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1213

MANUFACTURERS HANOVER LEASING CORPORATION,
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v.

HAROLD G. LOWERY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE EQUIPMENT LEASING ASSOCIATION OF AMERICA, INC., SUPPORTING THE GRANTING OF THE PETITION FOR CERTIORARI

The Equipment Leasing Association of America, Inc. (ELA) hereby moves for leave to file the annexed Brief Amicus Curiae of The Equipment Leasing Association of America, Inc. supporting the granting of the Petition For Certiorari. ELA's interest in this matter is set forth in the annexed Brief Amicus Curiae. A written consent has been obtained from petitioner, but consent has been refused by

respondent. These letters are being lodged with the Court.

Respectfully submitted,

/s/ Ellis Lyons
ELLIS LYONS
(Counsel of Record)
BENNETT BOSKEY
EDWARD A. GROOBERT
VOLPE, BOSKEY AND LYONS
918 16th Street, N.W., Suite #602
Washington, D.C. 20006
(202) 737-6580

Attorneys for Equipment Leasing Association of America, Inc.

February 1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1213

MANUFACTURERS HANOVER LEASING CORPORATION,
Petitioner,

v.

HAROLD G. LOWERY,
Trustee of Robinson Brothers Drilling, Inc.
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Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF AMICUS CURIAE OF THE EQUIPMENT LEASING ASSOCIATION OF AMERICA, INC., SUPPORTING THE GRANTING OF THE PETITION FOR CERTIORARI

The Equipment Leasing Association of America, Inc. (ELA), as amicus curiae, supports petitioner in urging that the petition for a writ of certiorari in this case be granted.

INTEREST OF ELA

ELA is the major national trade association in the multi-billion dollar equipment leasing industry, with

over 700 member companies, located throughout the United States and in foreign countries, engaged in every aspect of leasing equipment to business, commercial, governmental and agricultural organizations.

According to the Department of Commerce, the volume of equipment leasing in this country, as measured by original cost of the equipment, was $125 billion in 1993.[1] ELA estimates that ELA's members account for about two-thirds of this volume.

Equipment leasing represents over 30 percent of all capital investment in the United States each year. Second only to the commercial paper/bond market, leasing is the next largest source of investment capital for business, industry and agriculture in our economy. Equipment is also leased to federal, state and local governmental agencies for a variety of important public uses.[2]

Equipment lessors, when negotiating and entering into lease transactions, often require guarantees from principal shareholders, parent or affiliated corpora-

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[1] U.S. Department of Commerce, 1994 Industrial Outlook, p49-1.

[2] Equipment leasing is utilized by, and helps to fuel the economic growth and productivity of, virtually every segment of our economy. The types of equipment leased for business purposes include agricultural; aircraft; automobiles; computers; construction; container and intermodal equipment; electrical power generation; furniture and fixtures; industrial; manufacturing; materials handling; medical; office machines; pollution control and environmental; railroad rolling stock; telecommunications; trucks and trailers; and vessels. Equipment leasing is one of the major methods by which American businesses acquire the capital equipment and financing needed to succeed in today's highly competitive domestic and international markets.

tions or other "insiders" of lessees. This is particularly common in the case of lessees that are small businesses or new businesses where prudent business requires that the lessor obtain credit enhancement. The decision below adversely affects these classes of transactions because it exposes lessors in such cases to a one-year preference period in bankruptcy even though there would have been only a 90-day exposure in the absence of the guarantee. This, in turn, adversely affects the number of lease transactions entered into, the complexity of the negotiations in connection therewith, and the ultimate pricing of the transactions.

As the national trade association for equipment leasing companies, ELA is vitally interested in matters such as these which affect the operations of the members of the equipment leasing industry.

REASONS FOR GRANTING CERTIORARI

We rely on the legal analysis in the Petition for Certiorari for a showing of why the decision below should, after consideration on the merits, be duly reversed by this Court. What we wish to emphasize are the important reasons for this Court to grant certiorari in order to review the merits.

It is an unfortunate phenomenon of our times that bankruptcies occur all over the nation in substantial volume. The lessees of equipment are no exception; equipment leasing companies find that many of their lessees end up in the bankruptcy courts either as debtors in bankruptcy or in the hands of bankruptcy trustees.

Prudent lessors have undertaken in many cases to protect themselves against losses resulting from the

bankruptcy of their lessees by obtaining guarantees of lessee rental obligations, often from "insiders." Under the decision below, this prudent practice of obtaining guarantees from the lessee's principals or affiliates or other "insiders", instead of reducing the lessor's risk in bankruptcy, as was intended, has exposed the lessor to a quadrupled risk of preference liability—for a period of one year instead of 90 days. The imposition of this additional risk on lessors leads to higher pricing demands and more rigid credit requirements and, in many cases, will result in transactions not being consummated at all. We submit that this Court should not permit these unintended results to occur without its full consideration of whether they are permissible under the Bankruptcy Code.

As is apparent from this brief filed by ELA, the decision of the court below has much broader application than the debtor-creditor relationship involved in the present case. It adversely affects another very large segment of the American economy—the equipment leasing industry—at a time when impetus, rather than slowdown, is called for.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, the petition for certiorari should be granted.

Respectfully submitted,

ELLIS LYONS
(Counsel of Record)
BENNETT BOSKEY
EDWARD A. GROOBERT
VOLPE, BOSKEY AND LYONS
918 16th Street, N.W., Suite #602
Washington, D.C. 20006
(202) 737-6580

Attorneys for Equipment Leasing Association of America, Inc.

February 1994

Supreme Court, U.S.
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No. 93-1213

In The

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October Term, 1993

MANUFACTURERS HANOVER
LEASING CORPORATION,

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v.

HAROLD G. LOWREY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

GARY L. MORRISSEY
Counsel of Record
MAHAFFEY & GORE, P.C.
Two Leadership Square,
Suite 1100
211 N. Robinson
Oklahoma City, OK 73102
(405) 236-0478
Attorney for Harold G. Lowrey, Trustee of Robinson Brothers Drilling, Inc. and Robinson Brothers Drilling Company

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RULE 29.1 STATEMENT

Respondent Harold G. Lowrey, trustee in bankruptcy for Robinson Brothers Drilling, Inc. and Robinson Brothers Drilling Co. discloses that both of the above entities were recorganized through a confirmed chapter 11 bankruptcy reorganization plan with the successor entity being named Robinson, Inc.

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STATEMENT OF THE CASE

Harold G. Lowrey ("Respondent"), trustee in bankruptcy for Robinson Brothers Drilling, Inc. and Robinson Brothers Drilling Company ("Robinson Brothers") accepts petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

As set forth in Sup. Ct. R. 10.1 "a petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The sole reason stated in that rule as relevant to this case is, where the subject decision conflicts with one issued by another court of appeals, a writ of certiorari will be granted. That situation does not exist since every circuit previously facing the question raised by Petitioner has uniformly decided it.

Further, the Tenth Circuit court correctly applied Sections 547 and 550 of the Bankruptcy Code to the facts of the transaction between Petitioner and Respondent. That court found Respondent had satisfied every element of Section 547(b) to render the complained of transfer voidable. It further found that Petitioner had no defense to Respondent's claim under Section 547(c). Finally, since the transfer was void under Section 547, the circuit court found the transfer recoverable from Petitioner, as the initial transferee, under Section 550(a). Each finding was made based on a correct interpretation of Bankruptcy Code Sections 547 and 550.

ARGUMENT AND AUTHORITY

PROPOSITION I

NO SPECIAL OR IMPORTANT REASONS WITHIN THE MEANING OF SUPREME COURT RULE 10.1 EXIST.

Under the rules of this Court, a writ of certiorari is a matter of judicial discretion, to be granted only when there are special and important needs therefor. (Rule 10.1). The only reason among those presented in the rule applicable to this case is:

> When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. (Rule 10.1(a)).

Petitioner appears to seek to bring its request under this classification in arguing that a conflict among the Courts exists. But that argument is flawed.

Petitioner incorrectly states that only two other circuit courts have followed the decision in the initial case addressing the "insider guaranteed" preference issue, *Levit v. Ingersoll Rand Financial Corp.*, (In re V.N. DePrizio Construction Co.), 874 F.2d 1186 (7th Cir. 1989) (Pet. Brf. 12). Supplementing the decisions cited by Petitioner (*In re C-L Cartage Co.*, 899 F.2d 1490 (6th Cir. 1992) and *In re Suffola*, 2 F.3d 977 (9th Cir. 1993)), the Fifth Circuit also accepted the reasoning of *DePrizio* in its decision of *In the*

Matter of Southmark Corp., 993 F.2d 117, 120 (5th Cir. 1993). There has been no conflict between the circuits having addressed the question brought here by petitioner. Five circuits, the Fifth, Sixth, Seventh, Ninth and Tenth, have all faced the issue, each deciding it the same way – contrary to Petitioner's view.

The lower court cases cited by petitioner employed one legal fiction or another to escape the literal application of Bankruptcy Code ("Code") Sections 547 and 550. A Pennsylvania bankruptcy court created what it called the "two transfer" theory, making two transfers out of one actual transfer, in attempting to avoid applying the Code as written. *In re Mercon Industries, Inc.*, 37 B.R. 549 (Bankr. E.D. Pa. 1984). Other courts used what they perceived to be the equitable powers granted them under Code Section 105 to avoid a deemed inequitable result obtained from the literal application of a trustee's avoidance powers under Code Sections 547 and 500. *In re R.A. Beck Builder, Inc.*, 34 B.R. 888 (Bankr. W.D. Pa. 1983); *In re Aerco Metals, Inc.*, 60 B.R. 77 (Bankr. N.D. Tex. 1985). Respondent does not dispute that most district and bankruptcy courts, when presented this issue followed one of these two theories. But it is a fact that no circuit court facing the question has equivocated from adopting the *DePrizio* rationale. There is no reason to believe that when the decisions of the various bankruptcy and district courts reach the circuit level, the respective circuits will hold differently from the five which have already issued decisions. The uncertainty and continued dilemma of which Petitioner warns does not exist. This is not a proper case for which certiorari should be granted.

PROPOSITION II

THE COURT OF APPEALS CORRECTLY INTERPRETED CODE SECTIONS 547 AND 550

In arguing that the Court of Appeals failed to give effect to material statutory language of Code Sections 547 and 550, Petitioner incorrectly interprets Code Section 547. Petitioner says:

> Had the circuit court simply attempted to determine if all the elements of an avoidable preference contained in § 547 were present as to Manufacturers Hanover with respect to the transfers in issue, it would have found that subsection (b)(4) was not satisfied since such transfers were made beyond the 90-day period of subsection (b)(4)(A) which is applicable to non-insiders. (Pet. Brf. 16).

Petitioner's argument misses the distinction that, under Section 547(b), a transfer need be found voidable only as to the insider in order to be recovered from the non-insider under Section 550.

Section 547(b), as relevant here, states:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> (1) to or for the benefit of a creditor;
>
> * * *
>
> (4) made –
>
> * * *
>
> (b) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of the transfer was an insider; . . .

Since the transfer to Petitioner provided a benefit to an insider of the Debtor, it was voidable under Section 547(b). That law does not require a trustee to satisfy his Section 547(b) responsibility as to both the debtors' insider and non-insider to render a transfer voidable.

Section 547(g) imposes the burden on a trustee to prove every element of Section 547(b) for a transfer to be avoided. Once a trustee has satisfied that requirement, the burden is on the defendant to prove nonavoidability of a transfer under Section 547(c). The bankruptcy, district and circuit courts all found that the Trustee had proven each of the Section 547(b) elements present as to the debtor's insider. Petitioner was unsuccessful in proving to any of those courts the nonavoidability of the transfer under Section 547(c). Since the transfer was subject to avoidance, it is then necessary to examine Section 550.

Petitioner says the circuit court decision was erroneous:

> [S]ince it completely ignores the qualifying language of § 550(a) which permits recovery only "to the extent that a transfer is avoided under- . . . section 547." (Pet. Brf. 17).

As well as being denied by the Tenth Circuit court, Petitioner's argument was addressed and dismissed in *Suffola*. (Supra at 982). Interpreting Section 550(a), the Ninth Circuit agreed with *DePrizio's* statement that:

> The "to the extent that" language simply recognizes that transfers sometimes may be avoided only in part, and that only the avoided part of the transfer is recoverable. *DePrizio*, supra at 1196.

As *Suffola* went on to say:

> Although the Bank is not completely clear on the basis for its argument that it is "protected . . . from the avoidability of the [p]ayment", we are certain that it needs no such protection, for it is the transfer, not the Bank, that is avoided. The Bank seeks relief from liability ("recoverability") that is not afforded it by Sec. 550(a), the controlling section. *Suffola*, supra.

This reasoning blunts Petitioner's instant argument just as it did that of the bank involved in *Suffola*.

Only if the language quoted by Petitioner stated "to the extent that a transfer is avoided *as to the particular creditor* under . . . section 547" would this argument have validity. But the statute does not include that significant qualification. Instead, Section 550(a) says:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, *the trustee may recover*, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, *from*–
>
> > (1) *the initial transferee of such transfer* or the entity for whose benefit such transfer was made;. . . . (emphasis added)

Here, since the entire transfer was avoided under Section 547(b),the Trustee may recover from Petitioner, as the "initial transferee", the total amount of the avoided transfer.

Finally, Petitioner confuses matters further saying:

> But this concession fatally undercuts the rationale of the circuit court decision and the cases upon which it relies. Under that rationale, subsection (c) defenses of the non-insider creditor, like subsection (b) defenses, should not be considered at all once a transfer is avoidable under § 547(b) as to the insider guarantor, since the so-called "plain language"of § 550 entitles the trustee to recover from the non-insider creditor, i.e., the "initial transferee," without regard to whether the transfer would be independently subject to avoidance as to that creditor. (Pet. Brf. 18).

Petitioner's argument ignores the fact that a creditor's defenses under Section 547(c) are available to both the insider creditor and the non-insider creditor. For example, if an insider creditor had advanced new value in exchange for a transfer, even though that insider might otherwise satisfy the criteria of Section 547(b), it could avail itself of the defense under Section 547(c)(1) to defeat a trustee's avoidance action. Here, Petitioner was allowed to present what it considered its Section 547(c) defenses at a trial before the bankruptcy court in February 1991, being unsuccessful in that effort. While Sections 547(b) and 547(c) are parts of the same law, they are not "two sides of the same point" as Petitioner claims. (Pet. Brf. 15). Instead, they are two separate tests, one to be satisfied by a trustee, the other to be met by the transferee/defendant. (Section 547(g)). The circuit court ignored nothing in arriving at its interpretation of Sections 547 and 550.

CONCLUSION

Contrary to Petitioner's statement, the five courts of appeal previously addressing the so-called *DePrizio* rule have each adopted it. The refusal of some bankruptcy and district courts to follow these circuit court decisions will be addressed by their respective circuit courts. And the circuit court did not misinterpret Bankruptcy Code Sections 547 and 550. It is Petitioner which misinterprets those laws in failing to acknowledge the plain meaning of the statutes.

Five circuits have refused the treatment Petitioner claims it should receive. Petitioner has shown no convincing reason for this Court to exercise judicial discretion under Rule 10.1(a) to grant a writ of certiorari in this case. This Petition should be denied.

Respectfully submitted,

GARY L. MORRISSEY
MAHAFFEY & GORE, P.C.
Two Leadership Square, Suite 1100
211 N. Robinson
Oklahoma City, OK 73102
(405) 236-0478
Attorney for Respondent

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No. 93-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MANUFACTURERS HANOVER LEASING CORPORATION,
Petitioner,

v.

HAROLD G. LOWREY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AS AMICUS CURIAE OF THE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

JOHN J. GILL III
Counsel of Record
MICHAEL F. CROTTY
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

Counsel for Amicus Curiae

February, 1994

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OF THE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

In accordance with the provisions of Rule 37.2 of the Supreme Court Rules, the American Bankers Association hereby respectfully moves for leave to file a brief as amicus curiae in support of the Petitioner. Counsel for the Petitioner has consented to this filing; counsel for the Respondent has declined to consent.

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States. As a representative of the industry, the Association has a distinct interest in preserving the rights and reasonable expectations of banks in having money lent by them repaid by their debtors, especially when the lenders have taken steps allowed by law to fortify those rights and expectations.

The decision of the Tenth Circuit in the case below (and of others that have adopted similar reasoning) allows use of the Bankruptcy Code to favor less careful creditors over more careful ones, whereas a sensible public policy would dictate the contrary result; the decisions do nothing whatsoever for a debtor, thus serving no public interest in a "fresh start" either.

Consequently, the decision below--the first in this lengthening line of cases to be petitioned to this Court--raises issues of great importance to the industry, and we respectfully suggest that the Court might benefit from a brief that discusses those issues from a perspective broader than that of the immediate parties to the case.

WHEREFORE, the American Bankers Association moves that leave be granted to file the attached brief as amicus curiae.

Respectfully submitted,

\s\

John J. Gill III
General Counsel

\s\

Michael F. Crotty
Deputy General Counsel
for Litigation

American Bankers Association
1120 Connecticut Avenue, NW
Washington, D. C. 20036
(202) 663-5026

February, 1994

QUESTION PRESENTED

Whether a trustee in bankruptcy can avoid a transfer made by a debtor to an outside creditor more than ninety days but less than one year before the date of bankruptcy where the antecedent debt for which the transfer was made was guaranteed by an "insider" of the debtor and that "insider" does not factually benefit from the transfer.

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On Petition for Writ of Certiorari
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for the Tenth Circuit

BRIEF AS AMICUS CURIAE OF THE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the largest national trade association of the commercial banking industry in the United States. It has members in each of the fifty

states and the District of Columbia, and its members hold over ninety percent of the assets of the United States commercial banking industry.

It belabors the obvious to state that commercial banks make commercial loans, and that they have some interest in having loans they make repaid. In furtherance of that interest, it is not unusual for banks to seek and receive multiple assurances that a loan will be repaid as a condition of granting it in the first place. Banks may take a security interest in the property and assets of the debtor which may be foreclosed in the event of default; they may insist upon guarantees of the debt by third parties; or they may do both. All such efforts to assure, in advance, that loans will be repaid are important to the safe and sound operation of the banks--always an important consideration. The decision of the lower court in this case and in others following the same line of reasoning, turns the fair, reasonable, cautious effort of banks on its head. It has the effect of making a bank's loan less secure with a personal guarantee than it would have been without the guarantee. That makes no practical or economic sense. We respectfully suggest that it makes no legal sense either.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW DOES VIOLENCE TO THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE AND IS THEREFORE AT ODDS WITH THIS COURT'S DECISION IN *U.S. v. RON PAIR ENTERPRISES*

The law governing preferences in bankruptcy is found

at 11 U.S.C. section 547(b). In full text, it provides as follows:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
>
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made--
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if--
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

In this case, Manufacturers Hanover lent money to Robinson Brothers Drilling. The loans were to be repaid on a monthly or quarterly basis, and in fact some of the required payments were made by Robinson Brothers to Manufacturers Hanover during the period beginning one year prior to bankruptcy and ending ninety days prior to bankruptcy. The loans were personally guaranteed by one J. D. Hodges, the president and CEO of Robinson Brothers,

as well as the controlling shareholder. Mr. Hodges was, unquestionably, an "insider" of the Debtor. Equally unquestionably, Manufacturers Hanover was not. The Tenth Circuit has held that the payments in question by Robinson Brothers to Manufacturers Hanover were preferences and could be avoided by the Trustee, the Respondent in this case. *In re Robinson Brothers Drilling, Inc.*, 6 F.3d 701 (10th Cir. 1993). In addition, the court held, the preferences could be recovered from Manufacturers Hanover, though it is not an "insider" because it was the "initial transferee" under section 550(a)(1) of the Bankruptcy Code.[1]

This Court has made it entirely clear that in interpreting the Bankruptcy Code, as in other situations, "[t]he plain meaning of legislation should be conclusive, except in rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (citation omitted). *See also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

While the court below, and others adhering to the reasoning of the *Deprizio* cases, purport to follow the "plain meaning" of section 547, in point of fact, they deviate from that meaning in a number of key respects.

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[1] The Tenth Circuit's decision in this case is consistent with the holdings of three other circuits that have had occasion to deal with the so-called "trilateral preference" issue. *See In re Suffola*, 2 F.3d 977 (9th Cir. 1993), *In re C-L Cartage Co.*, 899 F.2d 1490 (6th Cir. 1992), and *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989) (hereinafter referred to as the *Deprizio* cases).

To begin, a transfer of property of the debtor to or for the benefit of a creditor, on an antecedent debt, made while the debtor was insolvent, may be avoided if it is made within ninety days before the date of the filing of the petition. 11 U.S.C. § 547(b). By negative inference, transfers made more than ninety days before filing are not avoidable. The ninety-day period is extended to one year if the creditor is an insider. In this case, it is undeniable that transfers of the property of the Debtor, Robinson Brothers, were made. It is undeniable that Manufacturers Hanover was a creditor of Robinson Brothers. It is undeniable that the payments were made on an antecedent debt. It is undeniable that the transfers of property were made to Manufacturers Hanover, and that the transfers were intended to, and did in fact, benefit Manufacturers Hanover. It is undeniable that the transfers were made more than ninety days before the filing of the petition. It is undeniable that Manufacturers Hanover was not an insider of the debtor. With all of those facts taken as givens, the discussion should come to an end: the transfers in question here are not avoidable.

Ignoring this set of facts, the court below focuses instead on the transfers made by the Debtor for the alleged benefit of the insider, Hodges (the very **same** transfers as those made **to** Manufacturers Hanover), holding that **those** transfers are avoidable and can be recovered from Manufacturers Hanover. Choosing the "insider" as the focal point of the court's attention in preference to the "outsider" makes it impossible to give effect to the "plain meaning" of the statute that protects a transfer to and for the benefit of an "outside" creditor made more than ninety days prior to the filing of a bankruptcy petition. There is nothing in the statute that directs the courts to focus on the "insider" rather

than the "outsider" in analyzing the issues presented here. Indeed, the statute suggests that it is error to do so.

First of all, in this case, as in the other *Deprizio* cases, it is easy enough to declare the guarantor an "insider," but far more difficult to find that the insider satisfies all of the tests set forth in section 547(b) to avoid a transfer. The transfer to or for the benefit of **a** creditor may be avoided if and only if the payment is "for or on the account of an **antecedent** debt owed by the debtor **before** such transfer was made." 11 U.S.C. § 547(b)(2). But here, Robinson Brothers clearly did not have an antecedent debt owed **to** the insider, Hodges, on account of which the transfers in question were made; did not owe anything to Hodges **before** the transfer was made. Any obligation by Robinson Brothers to Hodges could not arise, even contingently[2] until at least Robinson Brothers defaulted in its loan payments to Manufacturers Hanover, and not in reality until Hodges actually paid any of Robinson Brothers' debts to Manufacturers Hanover. The "antecedent" debt owed "before" the transfers was a debt owed not to Hodges but to Manufacturers Hanover, whereas this Court has held that "[p]reference implies paying or securing a pre-existing debt of the person preferred." *Dean v. Davis*, 242 U.S. 438, 443 (1917). In addition, under section 547, it is not enough that the transfer to a creditor be made on **any** antecedent debt more than ninety days and less than a year before filing of bankruptcy. Such a tranfer is avoidable only if **such** creditor is an insider. 11 U.S.C. § 547(b)(4)(B). A "creditor" is an "entity" that has a claim against the debtor" 11 U.S.C. § 101(10)(A). The law thus clearly ties the "antecedent" debt

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[2] *See* 11 U.S.C. §§ 101(12), 101(5)(A): a "debt" is a liability on a claim; a "claim" is a right to payment, whether or not contingent.

to a specific "creditor"--in this case, Hodges, not Manufacturers Hanover.

The same reasoning applies to section 547(b)(5). A transfer is avoidable only if "such creditor," here Hodges, receives more, by virtue of the transfer than "such creditor" (Hodges) would have received if the case were a Chapter 7 liquidation case and without the transfer. In point of fact, the guarantor "receives" less, not more, as a result of the transfers by the debtor to Manufacturers Hanover. Any claim that "such creditor" (Hodges) would have against Robinson Brothers would necessarily stem from his obligation, as guarantor, to pay Robinson Brothers' bills. The fact that Robinson Brothers made payments to Manufacturers Hanover reduced the contingent obligation that "such creditor" (Hodges) had on his guarantee from what that obligation would have been without the transfer. Since his contingent obligation was reduced, any claim he would eventually have against Robinson Brothers in a liquidation proceeding would be correspondingly reduced--dollar for dollar. The section 547(b)(5) test for avoidance is not and cannot be satisfied under the plain language of the statute.

Finally, section 547(b)(1) speaks of avoiding transfers made "to or for the benefit of a creditor." No transfer was made to Hodges. As a matter of economic reality,[3] the transfers that were made to Manufacturers Hanover did not benefit Hodges either. The transfers in question here totalled $175,000, and the court below holds that the transfers reduced Hodges' contingent liability in that amount.

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[3] In other contexts, this Court has given great weight to "economic realities" in construing statutory terms. *See, e.g., Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

But that is an entirely imaginary benefit. As the Tenth Circuit points out. Hodges' personal "negative net worth" was over $96 million. *Robinson Brothers*, 6 F.3d at 702. He will never, in fact, satisfy his guarantee; never, in fact, pay Manufacturers Hanover $175,000 worth of Robinson Brothers' bills or any part of it. Since he will never actually pay anyway, it is hard to see how telling him he does not have to really benefits him in any practical way. To find an actual benefit here is roughly akin to awarding a convicted felon a final, approved, unappealable sentence of six hundred years imprisonment, and then telling him he can receive up to one-third off for good behavior. The section 547(b)(1) test for avoidance is not satisfied here.

II.

THE DECISION OF THE COURT BELOW IS FUNDAMENTALLY INCOMPATIBLE WITH A DECISION OF THE FIRST CIRCUIT

In the preceeding section of this brief, we pointed out that the transfers to Manufacturers Hanover could not be avoided, under the plain language of section 547(b)(1) because they did not, in fact, "benefit" the "insider," Hodges. It is on this very point that the decision of the court below (and the other *Deprizio* cases) diverges from the decision of the First Circuit in *In re Erin Food Services, Inc.*, 980 F.2d 792 (1st Cir. 1992). In that case, the court refused to allow avoidance of a transfer of a debtors property to an outside creditor made more than ninety days but less than a year prior to filing of bankruptcy, even though the debt was guaranteed by an "insider."

The First Circuit itself takes great pains to downplay the difference in outcome between *Erin Food* and the

Deprizio cases, suggesting that they are distinguishable on their facts.

But they are not.

On a key analytical point, *Erin Food* is irreconcilable with the *Deprizio* cases. The First Circuit is unquestionably willing to consider the matter of "benefit" to the "insider" a question of fact (*Erin Food*, 980 F.2d at 801); the *Deprizio* cases invariably treat it as exclusively a question of law, automatically equating a mathematical or quantifiable monetary reduction in an insider's actual exposure with a "benefit" to the insider, even where the guarantor is overwhelmingly insolvent.[4]

The difference between the two forms of analysis have real-world consequences, and this Court should grant certiorari in order to choose which analysis is the correct one.

In the case below, the insider, Hodges, simply personally guaranteed the debts of Robinson Brothers to Manufacturers Hanover, without apparent limitation. In *Erin Food*, the insider pledged certain of his property, on a non-recourse basis, to secure Erin Food's debt. The amount of the debt exceeded $61 million, the "transfers" sought to be avoided by the trustee totalled $2.08 million, and the value of the pledged property was found to be $19.35 million. The court found that under these facts there was no "cognizable benefit" to the insider. His total exposure was the value of the pledged property, both before and after the transfers. The court reached this conclusion despite the

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[4] *See, e.g., Robinson Brothers*, 6 F.3d at 702; *In re Suffola*, 2 F.3d 977, 985 (9th Cir. 1993).

argument by the Trustee that the guarantor was potentially liable for the full $61 million indebtedness of Erin Food. The guarantor's greater potential liability could have been triggered by a substantial future increase in the value of the collateral. Still, the First Circuit concluded that

> This argument too is flawed....It is not enough that the trustee show that the value of the pledged collateral might have fluctuated during the ensuing period prior to bankruptcy. Moreover, the trustee presented no evidence that the collateral securing either Erin's debt or Murray's guarantee fluctuated during the year before bankruptcy.

Erin Food, 980 F.2d at 802 n. 17.

Thus, to the First Circuit, a mere theoretical possibility that, at some future point, the reduction in a guarantor's exposure might retroactively be found to benefit the guarantor is insufficient to satisfy the section 547(b)(1) test. By contrast, the Tenth Circuit finds nothing to suggest

> that the otherwise undeniable economic benefit represented by an actual reduction in pecuniary liabilities somehow disappears simply because the beneficiary remains insolvent following the reduction....[W]e refuse to graft a solvency condition onto the creditor-benefit requirement plainly stated in the statute.

Robinson Brothers, 6 F.3d at 703.[5]

Yet a "solvency condition" is precisely what the First Circuit did impose on the pledged property in *Erin Food*. The value of the property was grossly insufficient to satisfy the guarantee (although that condition was not inherently permanent), just as the value of Hodge's assets here are grossly inadequate to satisfy his guarantee. The transfer of even a considerable sum of the debtor's money to an outside creditor did not make it any more likely that the assets standing behind the guarantee would be able to satisfy the guarantee in *Erin Food* than it does in this case. The First Circuit, therefore, finds no factual benefit to the guarantor, and no avoidance of the transfers. The Tenth Circuit, on the other hand, finds a "legal" benefit and allows avoidance. Both cannot be correct interpretations of the same law.

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[5] *See also In re Suffola*, 2 F.3d at 986 ("Insolvency is transitory, or at least not inherently permanent. A decrease in insolvency, like an increase in the degree of solvency, is beneficial.").

CONCLUSION

For all of the reasons stated herein and in the Petition for Writ of Certiorari, the American Bankers Association, on behalf of its member banks, hereby respectfully urges the Court to grant the Petition.

Respectfully submitted,

John J. Gill III
General Counsel
Counsel of Record

Michael F. Crotty
Deputy General Counsel
for Litigation

American Bankers Association
1120 Connecticut Avenue, NW
Washington, D. C. 20036
(202) 663-5026

Attorneys for Amicus Curiae

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No. 93-1213

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MANUFACTURERS HANOVER LEASING CORPORATION,
Petitioner,

v.

HAROLD G. LOWERY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE COMMERCIAL FINANCE ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

A. BRUCE SCHIMBERG
H. BRUCE BERNSTEIN
DAVID M. SCHIFFMAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
* *Counsel of Record*

Counsel for Amicus Curiae
Commercial Finance Association, Inc.

February 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Commercial Finance Association, Inc. ("CFA") respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari submitted by Manufacturers Hanover Leasing Corporation. The respondent, Harold G. Lowery, has refused to consent to the filing of this brief.

The CFA is a non-profit membership corporation organized under the laws of Delaware, with its principal office in New York. It is the national trade association for financial institutions that provide asset-based commer-

cial financing. With over 200 members, the CFA includes nearly all of the major money center banks and important regional banks, small family-owned finance companies, and larger commercial lenders that are publicly held or owned by industrial companies and foreign banks.

Members of the CFA operate on a national, regional and local scale, providing operating funds and other types of financing to businesses. Most of these businesses are small or medium-sized companies dependent upon the availability of secured financing for the opportunity to grow. The secured financing provided by CFA members comprises a substantial portion of the national credit market.

The issue presented in this case has "generated nationwide concern within the lending community." [1] The issue is whether a lender faces substantially increased liability for preferences under the Bankruptcy Code simply because its loan has been guaranteed by an "insider" of the debtor. The lower courts are sharply split on this important question that arises frequently in bankruptcy proceedings.

Guaranties are common components of financial transactions, and the guarantor is usually an "insider" of the borrower, as that term is used in the Bankruptcy Code. Many loans, particularly to small or newly-formed businesses and to companies in poor financial condition, would not be made without the additional support provided by a guaranty. Lenders also desire guaranties so that in times of financial difficulty the borrower's managers have a continuing stake in the viability of the business; and in the event of bankruptcy, they have an incentive to assist in collecting debts and liquidating collateral. Also, when several affiliated corporations are under common ownership, lenders typically request intercorporate guaranties to

[1] W.A. Effross, *Deprizio's Honor: Lenders, Insider Guarantors and the Prisoners' Dilemma*, 21 Seton Hall L. Rev. 774, 775 (1991).

avoid problems resulting from transactions between the affiliates.

The members of the CFA, as well as all providers of commercial and consumer credit, are vitally concerned about an interpretation of the federal bankruptcy law, adopted by some courts but not others, which transforms a guaranty from a source of security into a source of risk. The CFA believes that the line of cases followed by the court below should be overruled. Regardless of how this issue is ultimately resolved, creditors and debtors need a clear answer to an important question that arises constantly in the administration of the bankruptcy laws, and a definitive answer is available only from this Court.

Accordingly, the CFA urges the Court to grant leave to file the *amicus curiae* brief that accompanies this motion.

Respectfully submitted,

A. BRUCE SCHIMBERG
H. BRUCE BERNSTEIN
DAVID M. SCHIFFMAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
* *Counsel of Record*

Counsel for Amicus Curiae
Commercial Finance Association, Inc.

February 1994

QUESTION PRESENTED

Section 547(b) of the Bankruptcy Code provides that a transfer by a debtor on an antecedent debt to a creditor within 90 days of bankruptcy can be avoided. With respect to a creditor who is an insider of the debtor, however, transfers within one year of bankruptcy can be avoided. The question presented is:

> Whether a transfer by a debtor on an antecedent debt between 90 days and one year preceding the date of bankruptcy to a non-insider creditor, which is not otherwise avoidable, can be avoided where such creditor holds a guaranty of the antecedent debt from an insider of the debtor, pursuant to 11 U.S.C. §§ 547(b) and 550(a) of the Bankruptcy Code?

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Washington Post, March 18, 1993 9

IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE COMMERCIAL FINANCE ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

REASONS FOR GRANTING THE PETITION

This case gives the Court its first opportunity to resolve the "storm of controversy" [1] that has followed in the wake

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[1] D.W. Baker, *Repayments of Loans Guaranteed by Insiders as Avoidable Preferences in Bankruptcy: Deprizio and Its Aftermath*, 23 U.C.C.L.Jnl. 115 (1990).

of the decision that is popularly known as *"Deprizio"*—*Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989). That decision has provoked not only a sharp division among the lower courts, but also a flood of litigation, a wealth of legal commentary, and a massive effort by lenders to restructure transactions so as to minimize the preference risks if a bankruptcy case happens to be filed in a district that follows *Deprizio*.

By granting the petition, the Court will resolve an important and constantly recurring issue of bankruptcy law that has divided the lower courts and that has disrupted commercial lending practices. The issue is whether a lender faces increased liability for preferences under the Bankruptcy Code simply because its loan has been guaranteed by an "insider" of the debtor. Section 547(b) of the Bankruptcy Code, which defines the elements of a preference, draws a careful distinction between ordinary creditors and insiders: an ordinary creditor is subject to preference liability *only* for payments received during the 90-day period preceding bankruptcy, but for insiders the preference period reaches back an entire year before bankruptcy.[2] Some courts have construed Section 550 of the Code to impose preference liability on *non*-insiders for payments received during the extended one-year preference period if the debt was guaranteed by an insider. This reading of the Bankruptcy Code "produces the anomalous result that a creditor who does not demand a guarantee can be in a better position than one who does." 4 L. King, *Collier on Bankruptcy* ¶ 550.02, at 550-14 (15th ed. 1993).

Granting the petition will also give this Court an opportunity to provide guidance concerning two principles

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[2] The fourth element of a preference, as set forth in Section 547(b)(4) of the Bankruptcy Code, 11 U.S.C. § 547(b)(4), is that the transfer must have been "made (A) on or within 90 days before the filing of the petition; or (B) between ninety days and one year before the filing of the petition, if such creditor at the time of such transfer was an insider. . . ."

of statutory construction that have confounded the lower courts. The first involves determining the "plain meaning" of statutes when separate provisions point in different directions and "there is no helpful legislative history." [3] Section 547(b)(4) of the Bankruptcy Code distinguishes between insiders and ordinary creditors, but, under the *Deprizio* court's interpretation, Section 550 negates that distinction.[4] The second principle of statutory construction concerns the significance of the well-established body of case law under the Bankruptcy Act of 1898 (the prior version of the bankruptcy statute). "The *Deprizio* rule represents a radical departure from pre-Bankruptcy Code practice," yet there is "no mention in the legislative record that Congress even considered abandoning the longstanding rule." *In re Erin Food Services, Inc.*, 980 F.2d 792, 797 & n.9 (1st Cir. 1992). The significance of pre-Code authority is a topic on which several Justices have perceived inconsistencies in this Court's decisions.[5]

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[3] *Deprizio*, 874 F.2d at 1196.

[4] "Section 547(b)(4) distinguishes according to [whether Guarantor is an 'insider'], but § 550 does not. It says that if a transfer is recoverable by the trustee, it may be recovered from *either* the 'initial transferee' (Lender) or the 'entity for whose benefit such transfer was made' (Guarantor)."

Deprizio, 874 F.2d at 1190 (Seventh Circuit's brackets and emphasis, *quoting Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890, 894 (7th Cir. 1988)).

[5] In *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986), the Court stated:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. . . . The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.

The proper application of this canon of construction to the Bankruptcy Code has produced considerable disagreement. *Compare Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 563 (1990), *with id.* at 570 (Blackmun, J., joined by O'Connor, J., dissenting); *compare United States v. Ron Pair Enterprises, Inc.*,

I. A DECISION BY THIS COURT IS ESSENTIAL TO RESOLVE THE SHARP SPLIT AMONG THE LOWER COURTS.

The Seventh Circuit's decision in *Deprizio* has been followed by the Sixth, Ninth and Tenth Circuits,[6] yet "the majority of lower courts have held to the contrary." 4 L. King, *Collier on Bankruptcy* ¶ 550.02, at 550-13 (15th ed. 1993). The *Deprizio* rule has been rejected by courts within the Second, Third, Fourth, Fifth, Eighth and Eleventh Circuits,[7] and thus is not followed in such major financial centers as New York City, Philadelphia, Miami, Pittsburgh, Dallas and Baltimore. Although no court of appeals has expressly rejected the *Deprizio* holding, it is based on an interpretation of the Bankruptcy Code that is contrary to the Fifth Circuit's reasoning in applying

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489 U.S. 235, 245 (1989), *with id.* at 249 (O'Connor, J., joined by Brennan, Marshall and Stevens, JJ., dissenting); *compare Dewsnup v. Timm*, 112 S. Ct. 773 (1992), *with id.*, 112 S. Ct. at 786 (Scalia, J., joined by Souter, J., dissenting).

[6] *In re C-L Cartage Co.*, 899 F.2d 1490 (6th Cir. 1990); *In re Suffola, Inc.*, 2 F.3d 977 (9th Cir. 1993); *In re Robinson Bros. Drilling, Inc.*, 892 F.2d 850 (10th Cir. 1989) (*per curiam*).

[7] *In re Rubin Bros. Footwear, Inc.*, 119 B.R. 416 (S.D.N.Y. 1990); *In re J.T.L. Supermarket Corp.*, 145 B.R. 3 (Bankr. N.D.N.Y. 1992); *In re Performance Communications, Inc.*, 126 B.R. 473 (Bankr. W.D. Pa. 1991); *In re R.A. Beck Builder, Inc.*, 34 B.R. 888, 894 (Bankr. W.D. Pa. 1983); *In re Mercon Industries, Inc.*, 37 B.R. 549 (Bankr. E.D. Pa. 1984); *In re Arundel Housing Components, Inc.*, 126 B.R. 216 (Bankr. D. Md. 1991); *In re Aerco Metals, Inc.*, 60 B.R. 77 (Bankr. N.D. Tex. 1985); *In re Midwestern Cos.*, 102 B.R. 169 (W.D. Mo. 1989); *In re Grove Peacock Plaza, Ltd.*, 142 B.R. 506 (Bankr. S.D. Fla. 1992); *In re Cove Patio Corp.*, 19 B.R. 843 (Bankr. S.D. Fla. 1982). *But see In re Pine Springs Farm & Casino, Inc.*, 139 B.R. 90 (Bankr. N.D.N.Y. 1992); *In re Dovetailed Enterprises, Inc.*, 136 B.R. 652 (Bankr. W.D. Va. 1991); *In re David Jones Builder, Inc.*, 129 B.R. 682, 693 (Bankr. S.D. Fla. 1991); *In re Installation Services, Inc.*, 101 B.R. 282 (Bankr. N.D. Ala. 1989).

Sections 547 and 550,[8] and contrary to all the relevant decisions construing the Bankruptcy Act of 1898.[9] The First and Fourth Circuits have specifically refused to rule on the validity of the "very controversial" *Deprizio* theory.[10]

This conflict concerning a fundamental provision of bankruptcy law is sure to persist, given the strongly held view by many judges that the *Deprizio* decision is profoundly wrong. *See, e.g., In re Performance Communications, Inc.*, 126 B.R. 473, 476-77 (Bankr. W.D. Pa. 1991) ("*Deprizio* is fatally flawed," "methodologically unsound," and "grossly inequitable"); *In re Rubin Bros. Footwear, Inc.*, 119 B.R. 416, 425 (S.D.N.Y. 1990) (court will not follow the "much criticized" *Deprizio* decision unless required by the Second Circuit); *In re Arundel Housing Components, Inc.*, 126 B.R. 216, 219 (Bankr. D. Md. 1991) ("This Court strongly disapproves of the *Deprizio* decision because it represents an incorrect interpretation of the law whose application would subvert justice, produce much needless mischief and create an unfortunate result in the instant case"). Thus, the Court's ordinary preference for a circuit conflict to justify certiorari ought not to be slavishly adhered to in this case,

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[8] In *In re Compton Corp.*, 831 F.2d 586 (5th Cir. 1987), *on reh'g*, 835 F.2d 584 (1988), the Fifth Circuit adopted the "Direct/Indirect Transfer Doctrine." The court held that a single conveyance of property could constitute "two transfers, one direct and one indirect. The direct transfer . . . may be valid and not subject to a preference attack," whereas the indirect beneficiary may be liable. 831 F.2d at 591. The *Deprizio* court had to reject this doctrine in order to reach its decision. 874 F.2d at 1195-96. The Fifth Circuit recently acknowledged the tension between its *Compton* decision and *Deprizio*. *See In re T.B. Westex Foods, Inc.*, 950 F.2d 1187, 1193-94 (5th Cir. 1992).

[9] *See, e.g., Dean v. Davis*, 242 U.S. 438, 443 (1917); *Aulick v. Largent*, 295 F.2d 41, 52 (4th Cir. 1961).

[10] *In re Jefferson Bigelow Design Group, Inc.*, 956 F.2d 479, 483 n.2 (4th Cir. 1992); *In re Erin Food Services, Inc.*, 980 F.2d 792, 798-99 (1st Cir. 1992).

where the division among the lower courts plainly exists and causes a serious disruption in the primary commercial activity of banks and other lending institutions.

The lower court decisions are sharply divided about the plain meaning of the Bankruptcy Code provisions at issue here, and whether those provisions are ambiguous. The Ninth Circuit recently followed *Deprizio* based on its view that "Section 550 is unambiguous." *In re Suffola, Inc.*, 2 F.3d 977, 983 (9th Cir. 1993). Yet, the First Circuit saw an "inherent ambiguity in Bankruptcy Code § 550." *In re Erin Food Services, Inc.*, 980 F.2d 792, 797 n.9 (1st Cir. 1992). Still other courts have concluded that the *Deprizio* interpretation is *contrary* to "the 'clear,' 'unambiguous' and 'unconditional' language of the statute." *In re Midwestern Cos.*, 102 B.R. 169, 172 (W.D. Mo. 1989).[11]

The courts are also divided as to whether the *Deprizio* rule serves the policies of the Bankruptcy Code. The Seventh Circuit thought that the rule reasonably balanced the interests of all creditors. *Deprizio*, 874 F.2d at 1195, 1198. Other courts, however, believe the *Deprizio* rule "would likely impede the availability of credit to ailing businesses," thereby precipitating bankruptcies. *In re Rubin Bros. Footwear, Inc.*, 119 B.R. 416, 425 (S.D.N.Y. 1990). If lenders must face added preference risks by obtaining guaranties from insiders, they "will be less likely to make such loans to small businesses, new businesses, and businesses of the entrepreneurial type." *In re J.T.L. Supermarket Corp.*, 145 B.R. 3, 4 (Bankr. N.D.N.Y. 1992). The point was stated more bluntly by

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[11] *Accord, In re Grove Peacock Plaza, Ltd.*, 142 B.R. 506, 516 (Bankr. S.D. Fla. 1992) (rejecting *Deprizio* based on "clear, unambiguous language"); *In re Performance Communications, Inc.*, 126 B.R. 473, 477 (Bankr. W.D. Pa. 1991) (*Deprizio* "ignores the plain, unambiguous language" of Code provisions).

Professor Baker: *Deprizio* "will severely impair the ability of small, closely held businesses to obtain credit" [12]

In sum, the conflict over *Deprizio* is deep and wide, and can only be resolved by a decision of this Court. No good reason exists to postpone the inevitable—review by this Court—and allow the conflicting interpretations of the Bankruptcy Code to distort lending practices, or worse, to serve as a trap for lending institutions that do not accurately predict whether *Deprizio* will apply to their transactions.

II. THE UNCERTAINTY CREATED BY *DEPRIZIO* HAS DISRUPTED LENDING PRACTICES AND THE ADMINISTRATION OF BANKRUPTCY CASES.

The specter of "*Deprizio* liability" has had a serious impact on credit transactions. In the past, lenders were always better off—or at least no worse off—if they obtained a guaranty. Now, lenders face a difficult decision that must be evaluated on a case-by-case basis. The support of a guaranty may be critical to the soundness of a credit transaction, but if a court later decides to apply the *Deprizio* rule, the lender will face four times as much preference exposure (one year of payments versus 90 days) than if it did not hold a guaranty. Under *Deprizio*, the lender is "penalized for its prudence in seeking a guarantor." *In re R.A. Beck Builder, Inc.*, 34 B.R. 888, 894 (Bankr. W.D. Pa. 1983).

Lenders must also consider the pros and cons of various techniques for structuring transactions so as to avoid the formalistic *Deprizio* rule. On this subject there has been an outpouring of legal analysis. For example, one school of thought is that a guaranty from an insider will not result in *Deprizio* liability if the guarantor waives his right to subrogation and reimbursement from the bor-

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[12] Baker, *supra* note 1, at 148.

rower.[13] However, such waivers are often difficult to negotiate, and it has been argued that the lender may be even worse off in bankruptcy if the transaction is structured in this manner.[14] Another recommendation is that lenders seek a guaranty limited to a sum which is much less than the total amount of the loan.[15] Unfortunately, no one can be certain how such transactions would be treated by courts construing the Bankruptcy Code. "*Deprizio* thrusts those who extend credit, and their counsel, into largely unchartered waters." D.I. Katzen, *Deprizio and Bankruptcy Code Section 550: Extended Preference Exposure Via Insider Guarantees, and Other Perils of Initial Transferee Liability*, 45 Bus. Law. 511 (1990).

In the final analysis, the decision to extend credit depends primarily on two considerations: the risk of nonpayment and the price received. Uncertainty about the *Deprizio* rule adds to the risk, and therefore the cost, of credit.

Uncertainty over the *Deprizio* rule also has a major impact on the administration of bankruptcy cases. Currently, about 70,000 businesses file for bankruptcy each

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[13] The theory is that if the guarantor has no claim against the debtor, then the guarantor is not a "creditor," as required by Section 547(b)(1) (transfer must be "to or for the benefit of a creditor").

[14] *See* P.L. Borowitz, *Waiving Subrogation Rights and Conjuring Up Demons in Response to Deprizio*, 45 Bus. Law. 2151, 2168 (1990) ("institutional lenders should think more than twice before they revise their guaranty forms to require guarantors to waive subrogation rights"). This author believes that a loan payment might in some circumstances be characterized as a fraudulent conveyance for the benefit of the insider-guarantor if the insider would otherwise have been required to repay the loan without recourse to the debtor.

[15] The theory is that a partial repayment of the loan will not "benefit" the guarantor if the remaining loan balance still exceeds the maximum amount of the guaranty; the guarantor's potential liability remains the same after the payment of the loan.

year,[16] and preference litigation is a major component of many of those cases, consuming a substantial amount of judicial time and resources. "Preference litigation plays an integral role in many bankruptcy cases, whether liquidation or reorganization." M. Cook, *Bankruptcy Litigation Manual* 409 (1991).

In every court without a controlling precedent, there is uncertainty, and hence the likely prospect of expensive litigation, about whether the *Deprizio* rule should be adopted in preference cases. Even where *Deprizio* clearly applies, courts must address various ancillary questions. For example, they must decide what constitutes a "benefit" to an insider. Does the insider benefit if the payment of a debt helps stave off bankruptcy? *See In re Erin Food Services, Inc.*, 980 F.2d 792 (1st Cir. 1992) (insider does not benefit; reversing lower courts). Does the insider benefit if he is hopelessly insolvent whether or not the debt is paid? *See Lowrey v. Manufacturers Hanover Leasing Corp.*, 6 F.3d 701 (10th Cir. 1993) (insider benefits). Is the "benefit" determined as of the date of payment or as of the date of bankruptcy? *Compare Lowrey* (date of payment) *with In re Suffola, Inc.*, 2 F.3d 977 (9th Cir. 1993) (date of bankruptcy). Does a creditor face preference liability if its loan was fully secured by collateral at the time of payment? In dictum, *Deprizio* said the creditor would not be liable, but fully-secured creditors were held liable in both *Suffola* and *In re C-L Cartage Co.*, 899 F.2d 1490 (6th Cir. 1990).

The *Deprizio* line of cases thus imposes two significant practical burdens upon lenders. First, it interferes with their basic credit decisions by interjecting a potentially unpredictable legal variable into their calculations. Second, it imposes upon lenders (and federal courts) a significant litigation burden, both in resolving the applica-

[16] *See Washington Post*, March 18, 1993, at C15 (citing report by the American Bankruptcy Institute based on statistics of the Administrative Office of U.S. Courts).

bility of *Deprizio* and in having to decide the myriad issues that arise if *Deprizio* is held to apply. Because the financial world without *Deprizio* poses fewer risks to creditors and is much simpler for lenders and the courts, the time has come to decide whether Congress really intended *Deprizio* to be the law. Only this Court can resolve that issue once and for all.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A. BRUCE SCHIMBERG
H. BRUCE BERNSTEIN
DAVID M. SCHIFFMAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
* *Counsel of Record*

Counsel for Amicus Curiae
Commercial Finance Association, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MANUFACTURERS HANOVER
LEASING CORPORATION,

Petitioner,

—v.—

HAROLD G. LOWREY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF THE NEW YORK CLEARING HOUSE ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION AND BRIEF OF *AMICUS CURIAE*

H. RODGIN COHEN
MICHAEL M. WISEMAN
WILLIAM L. FARRIS

SULLIVAN & CROMWELL
Of Counsel

BRUCE E. CLARK
Counsel of Record for
The New York Clearing
House Association
Amicus Curiae
125 Broad Street,
New York, New York 10004.
(212) 558-4000

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF THE NEW YORK CLEARING HOUSE ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The New York Clearing House Association[1] (the "Clearing House") respectfully moves for leave to file the brief annexed hereto as *amicus curiae* in support of the petition for a writ of certiorari of Manufacturers Hanover

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York.

Leasing Corporation. The issue presented by the petition—whether a lender is exposed to an expanded preference period in a bankruptcy case because an insider has guaranteed the debtor's obligations to the lender—is a matter of significant concern to the Clearing House and its members.

Petitioner has consented to the filing of a brief *amicus curiae* by the Clearing House, but respondent has withheld his consent.

Respectfully submitted,

BRUCE E. CLARK
Counsel of Record for
The New York Clearing
House Association
Amicus Curiae
125 Broad Street,
New York, New York 10004.
(212) 558-4000

H. RODGIN COHEN
MICHAEL M. WISEMAN
WILLIAM L. FARRIS

SULLIVAN & CROMWELL
Of Counsel

February 28, 1994

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE* SUPPORTING THE PETITION

Interest of *Amicus Curiae*

The New York Clearing House Association (the "Clearing House") is an association of 11 leading commercial banks in the City of New York.[1] The Clearing House banks

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York.

are among the nation's largest consumer and commercial lenders, with more than $346 billion in domestic loans outstanding. The Clearing House banks have a substantial interest in having a clear rule governing the application of the preference provisions of the Bankruptcy Code to payments made on bank loans or other commercial credit arrangements. The petitioner is a subsidiary of a Clearing House member.

The issue presented in this case is whether the Bankruptcy Code provides for expanded preference liability for a non-insider creditor because the debtor's obligations to the creditor have been guaranteed by an insider of the debtor. Ordinarily a payment to a creditor is subject to avoidance under section 547 of the Bankruptcy Code only if the payment was made within 90 days of the filing of the petition, but this period is expanded to a year if the creditor is an insider. The decision below concludes that the full year preference period is applicable to a non-insider creditor who holds a guarantee from an insider.

The issue of statutory interpretation presented in this case has received considerable and conflicting attention from the lower courts and from the commentators. The intensity of this scrutiny has not produced a convergence of views. Only a decision of this Court can resolve the conflicting interpretations of the Bankruptcy Code's preference rules.

The rule followed by the court below, and the state of continuing uncertainty as to whether a particular court not subject to binding precedent will follow it, has disrupted the marketplace for commercial credit, particularly for smaller business borrowers. Lenders have traditionally viewed an insider guarantee as an important means of reducing the risk of loss from a commercial loan, because such a guarantee provides the insider with an incentive to continue to operate the debtor's business and to wind up its affairs in an orderly manner if the business is to be closed. Under the rule followed below, however, a lender must either forgo these

benefits by not obtaining a guarantee, expose itself to expanded preference liability if the guarantee is obtained, or negotiate a waiver of the insider's reimbursement rights. By placing the lender in this position, the rule adopted below restricts the availability of credit to borrowers from which a lender would otherwise seek a guarantee and affects the economic assumptions upon which the transaction otherwise would be structured.

The availability of credit for business, and particularly for small businesses and new enterprises, is a matter of clear importance for the nation's economy. A decision clarifying the effect of an insider guarantee upon the rights of a non-insider creditor would strongly enhance the ability of the Clearing House banks and of other lenders to make informed credit decisions.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to resolve sharply contested issues of statutory interpretation and to remove uncertainty in a vital area of credit for the nation's businesses.

I.

The Question Presented Has Divided the Lower Courts.

This petition presents this Court's first opportunity to review the holding of *Levit* v. *Ingersoll Rand Financial Corp.* (*In re V.N. DePrizio Construction Co.*), 874 F.2d 1186 (7th

Cir. 1989) ("*DePrizio*").[2] Although no court of appeals has expressly rejected the *DePrizio* rule, numerous lower courts have done so.[3]

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[2] In addition to the Tenth Circuit in this case, the Sixth and Ninth Circuits have also followed *DePrizio*. *Ray* v. *City Bank & Trust Co.* (*In re C-L Cartage Co.*), 899 F.2d 1490 (6th Cir. 1990); *Official Unsecured Creditors Committee of Suffola, Inc.* v. *U.S. National Bank of Oregon* (*In re Suffola, Inc.*), 2 F.3d 977 (9th Cir. 1993). Decisions from the First and Fourth Circuit decline to decide whether to follow *DePrizio*. *Travelers Ins. Co.* v. *Cambridge Meridian Group, Inc.* (*In re Erin Food Servs., Inc.*), 980 F.2d 792, 797 n. 9 (1st Cir. 1992) (noting that "the *DePrizio* rule represents a radical departure from pre-Bankruptcy Code practice" and the absence of any legislative history evidencing an intent to change the law); *Harmon* v. *First Am. Bank of Maryland* (*In re Jeffrey Bigalow Design Group, Inc.*), 956 F.2d 479, 483 n.2 (4th Cir. 1992) (declining to comment on the "viability" of "very controversial" theory). A decision by the Fifth Circuit does not discuss the correctness of the *DePrizio* rule, but finds the rule inapplicable upon the facts before the court. *Southmark Corp.* v. *Southmark Personal Storage, Inc.* (*In re Southmark Corp.*), 993 F.2d 117, 120 (5th Cir. 1993).

[3] *Weiskopf* v. *New York Job Development Authority* (*In re J.T.L. Supermarket Corp.*), 145 Bankr. 3, 4 (Bankr. N.D.N.Y. 1991) (*DePrizio* discourages loans to small businesses, new businesses and businesses of the entrepreneurial type); *Grove Peacock Plaza, Ltd.* v. *Resolution Trust Corp.* (*In re Grove Peacock Plaza, Ltd.*) 142 Bankr. 506 (Bankr. S.D. Fla. 1992); *Performance Communications, Inc.* v. *First National Bank* (*In re Performance Communications, Inc.*), 126 Bankr. 473 (Bankr. W.D. Pa. 1991); *Official Creditors' Committee of Arundel Housing Components, Inc.* v. *Georgia Pacific Corp.* (*In re Arundel Housing Components, Inc.*) 126 Bankr. 216, 219 (Bankr. D. Md. 1991) (following *DePrizio* would "subvert justice" and "produce much needless mischief"); *Rubin Bros. Footwear, Inc.* v. *Chemical Bank* (*In re Rubin Bros. Footwear, Inc.*), 119 Bankr. 416, 425 (S.D.N.Y. 1990) (*DePrizio* rule "would likely impede the availability of credit to ailing businesses"); *Block* v. *Texas Commerce Bank N.A.* (*In re Midwestern Cos.*), 102 Bankr. 169 (W.D. Mo. 1989); *In re Aerco Metals, Inc.*, 60 Bankr. 77 (Bankr. N.D. Tex. 1985);

(continued...)

The conflict between courts that accept *DePrizio* and courts that reject it arises over whether each of the elements of a preference must be present with respect to the creditor from whom the trustee seeks recovery. *DePrizio* and its progeny conclude that no such requirement exists. Other courts have concluded that the *DePrizio* rule ignores material language of section 550, the section that establishes liability for an avoided transfer, which provides for recovery only "to the extent that" a transfer is avoided under section 547 (the preference provision).

The *DePrizio* rule relies on an approach to the relevant provisions of the Code that appears simple only because it disregards features of statutory language and structure that are inconsistent with the *DePrizio* result:

1. Section 547(b)(4) carefully distinguishes insiders from creditors generally and provides for extended preference liability for insiders. This structure mandates that the outside lender cannot be liable for payments made more than 90 days before the bankruptcy filing.[4] In order to construe section 550, which provides for recovery of avoided transfers, in harmony with section 547, section 547's distinct treatment of transfers to outside creditors must be maintained in interpreting the trustee's recovery powers under section 550, by providing that only an insider may be liable as a transferee of an avoided transfer if the transfer occurred more than 90 days before the filing. *DePrizio* interprets section 550 in a manner that defeats the distinction between insiders and

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[3](...continued)
Goldberger v. *Davis Jay Corrugated Box Corp.* (*In re Mercon Industries, Inc.*), 37 Bankr. 549 (Bankr. E.D. Pa. 1984).

[4] *Block v. Texas Commerce Bank Nat'l Ass'n* (*In re Midwestern Cos.*) 102 Bankr. 169 (W.D. Mo. 1989); *In re Grove Peacock Plaza, Ltd.*, 142 Bankr. 506 (Bankr. S.D. Fla. 1992).

non-insiders under section 547, and thus fails to give effect to section 550's "to the extent that" language.[5]

2. Where the language of the Bankruptcy Code is ambigious, courts are not to assume that the Code was intended to change the result that obtained under the Bankruptcy Act absent legislative history that reflects an intent to change the law.[6] *DePrizio* effected such a change, while conceding the silence of the legislative history.[7]

3. The entire *DePrizio* analysis is based on the premise that a payment to the non-insider creditor is "for the benefit" of an insider who has given a guarantee. In ordinary speech, to say that an act is "for the benefit" of another is to imply an intention to confer a benefit. In applying the *DePrizio* rule, however, courts have not sought to determine whether such an intention is present in fact; they have confined their attention to determining whether the transfer left the insider better off in some objective sense, and have accepted highly attenuated grounds for concluding that he or she is. This case, in which the court found that a transfer was "for the benefit" of an insider whose aggregate liabilities were nominally reduced by the transfer but who nonetheless remained hopelessly insolvent after the transfer, is illustrative.

4. Many courts have concluded that a payment to a non-insider creditor and the resulting reduction in the liability of the insider guarantor should be analyzed as distinct transfers. Under that analysis the transfer to the insider may

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[5] *In re Performance Communications, Inc.*, 126 Bankr. 473 (Bankr. W.D. Pa. 1991); *In re Aerco Metals, Inc.*, 60 Bankr. 77 (Bankr. W.D. Tex. 1985); *In re Mercon Industries, Inc.*, 37 Bankr. 549 (Bankr. E.D. Pa. 1984).

[6] *Dewsnup* v. *Timm*, 112 S. Ct. 773, 779 (1992).

[7] 874 F.2d at 1196.

be avoided for up to a year, but the transfer to the non-insider is not subject to avoidance if it is made more than 90 days before the bankruptcy. The Bankruptcy Code defines "transfer" broadly as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property." 11 U.S.C. § 101(54). This language supports the "two transfer" theory.[8]

5. Even some courts that find persuasive the statutory interpretation in *DePrizio* have concluded that the court's equitable powers should be used to prevent the result which *DePrizio* mandates.[9]

II.

Uncertainty Caused by the Conflict Among Lower Courts Is Disrupting the Marketplace for Commercial Credit.

The risk that the *DePrizio* rule will be applied places commercial lenders in the untenable position of having to decide whether the potential benefits of an insider guarantee outweigh the additional preference risk to which the lender is or might be subjected. Faced with such uncertainty, the lender will likely decide to extend credit only for a higher price, or not to extend credit at all. As a result, small and entrepreneurial businesses in particular face increased difficulties in getting the credit they need. These loans are

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[8] *Goldberger* v. *Davis Jay Corrugated Box Corp.* (*In re Mercon Industries, Inc.*), 37 Bankr. 549 (Bankr. E.D. Pa. 1984).

[9] *Schmitt* v. *Equibank* (*In re R. A. Beck Builder, Inc.*), 34 Bankr. 888 (Bankr. W.D. Pa. 1983); *Performance Communications, Inc.* v. *First Nat'l Bank* (*In re Performance Communications, Inc.*), 126 Bankr. 473, 477 (Bankr. W.D. Pa. 1991).

often made with credit enhancement from the Small Business Administration, thereby involving governmental entities in the *DePrizio* dilemma.

A lender concerned with the *DePrizio* rule or its possible application also faces difficult decisions concerning whether to attempt to negotiate terms that may ameliorate its application. Many have suggested that a lender should seek the insider's waiver of the right of reimbursement against the debtor, thus avoiding the *DePrizio* finding that the guarantor is a "creditor" of the debtor, but such waivers are difficult to negotiate. Some argue that such a waiver leaves the lender worse off, and in any event it is unclear how the courts will treat such a waiver. And all would agree that the uncertainty created by *DePrizio* gives such a guarantee less value, both to the lender and to the borrower who would offer it. Another possibility is to accept a guarantee from the insider that is limited to a dollar amount less than that of the debtor's obligations to the lender, or under which the lender's recourse against the guarantor is limited to specified collateral. These artificial measures also limit the effectiveness of the guarantee, and in any event the decided cases do not provide the lender with a high degree of confidence that these measures will be upheld.

DePrizio can cause mischief even when the "insider"-guarantor is not in a position to cause the debtor to make payments, as in the case of an operating company that guarantees the debts of its corporate parent.[10] *DePrizio* can even cause problems for a creditor that does not hold a guarantee. A secured creditor with no insider guarantee could be subjected to the expanded preference period because a junior lienholder holds an insider guarantee. The possibility of such an anomalous result gives secured creditors an

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[10] The subsidiary is an "affiliate" under 11 U.S.C. § 101(2) and is thus deemed an "insider" under 11 U.S.C. § 101(31).

incentive to seek to prohibit debtors from granting junior liens, thus further restricting their borrowing power.

The *DePrizio* issue is not confined to the context of corporate borrowers. A lender to a general partnership could be subjected to the *DePrizio* rule based on the liability of each general partner (who is defined as an "insider" under the Bankruptcy Code) for the debts of the partnership.

This uncertainty also has a negative effect upon the administration of justice in bankruptcy proceedings. As long as there is no controlling precedent concerning the *DePrizio* rule, expensive and time-consuming litigation is necessary to determine what rule will apply. This uncertainty can be resolved by a decision from this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari to the Tenth Circuit should be granted.

Respectfully submitted,

BRUCE E. CLARK
Counsel of Record for
The New York Clearing
House Association
Amicus Curiae
125 Broad Street,
New York, New York 10004.
(212) 558-4000

H. RODGIN COHEN
MICHAEL M. WISEMAN
WILLIAM L. FARRIS

SULLIVAN & CROMWELL
Of Counsel

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Petition For Writ Of Certiorari
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For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD E. BARNSBACK
PHILLIP E. STANO
American Council Of Life Insurance
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2599

CHRISTOPHER F. GRAHAM*
ROBERT M. ZINMAN
A. JAMES COTINS
THACHER PROFFITT & WOOD
Two World Trade Center
New York, New York 10048
(212) 912-7400

* Counsel of Record for *Amicus Curiae.*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The American Council of Life Insurance (the "Council") by and through its undersigned attorneys, hereby respectfully moves this Court for leave to file the attached *amicus curiae* brief in support of the Petitioner.

Consent of Parties

1. The attorneys for the Council attempted to obtain consent to file the proposed *amicus curiae* brief (the "Proposed Brief") from counsel for both parties to this action. The attorney for the Respondent refused to give such consent, and accordingly, this motion is necessary.

Interest of the *Amicus*

2. The Council is a nonprofit voluntary trade association, the membership of which totals 634 legal reserve life insurance companies doing business throughout the United States. The member companies of the Council account for 89.9 percent of the legal reserve life insurance in force in this country and afford protection to approximately 140 million insureds.

3. Life insurance companies are among the nation's largest lenders. At the end of 1992, life insurance companies held $881 billion of debt from corporations, partnerships and other business entities.[1] Where loans are

[1] American Council of Life Insurance, 1993 Life Insurance Fact Book Update p.48 (ACLI, Washington, D.C. 1993).

nonrecourse, which is often the case in connection with real estate mortgage loans, or where the borrower's credit rating is less than what would be required to protect the insurer's policyholders, the loan can be closed only with additional financial security such as a guarantee of the indebtedness. Often such guarantees are available only from insiders of the borrower – particularly in the case of small or family-owned businesses.

4. The focal issue of this case – whether the preference provisions of the Bankruptcy Code subject payments to a lender to the insider preference reachback period of one year when the loan is guaranteed by an insider – is of grave concern to the Council and its members. Due to the long involvement of the Council and its members with loans guaranteed by insiders, and in the legislative process leading to the drafting of the Bankruptcy Code and the amendments thereto, the Council is uniquely qualified to comment on the language of the Bankruptcy Code governing preferential transfers and the effect of the so-called *Deprizio* doctrine on the legitimate expectations of lenders.[2]

5. The Council offers this *amicus curiae* brief to support the Petitioner and to explain the serious impact that the holding below, if not reversed, could have on all lenders and their willingness to make loans where an insider guarantee would be required. The Council believes that the arguments presented in the Proposed

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[2] The doctrine at issue in this case was adopted by the Court in *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186 (7th Cir. 1989), a decision arising in a bankruptcy case, *In re Deprizio*.

Brief are important and have not yet been brought to the Court's attention.

The Proposed *Amicus Curiae* Brief

6. A copy of the Proposed Brief is submitted herewith. The Proposed Brief complies with all of the requirements of the Rules of this Court.

Conclusion

Due to the Council's substantial interest in the outcome of this matter and due to the substantial importance of the issues to be decided, the Council respectfully requests that its motion for a leave to file an *amicus curiae* brief be granted.

Dated: New York, New York
February 28, 1994

Respectfully submitted,

By: _____
CHRISTOPHER F. GRAHAM

THACHER PROFFITT & WOOD
Counsel of Record for
The American Council of Life Insurance
Two World Trade Center
New York, New York 10048
(212) 912-7400

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The question addressed by the *Amicus Curiae* is as follows:

> Whether the Supreme Court should adopt the interpretation of Sections 547 and 550 of Title 11, United States Code (the "Bankruptcy Code") supported by the Court below, as articulated in *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186 (7th Cir. 1989) (hereinafter referred to as the "*Deprizio* Doctrine").

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BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

The American Council of Life Insurance (the "Council") is a nonprofit voluntary trade association, the membership of which totals 634 legal reserve life insurance companies doing business throughout the United States. The member companies of the Council account for 89.9 percent of the legal reserve life insurance in force in this country and afford protection to approximately 140 million insureds.

Life insurance companies are among the nation's largest lenders. At the end of 1992, life insurance companies held $881 billion of debt from corporations, partnerships and other business entities.[1] Where loans are nonrecourse, which is often the case in connection with real estate mortgage loans, or where the borrower's credit rating is less than what would be required to protect the insurer's policyholders, the loan can be closed only with additional financial security such as a guarantee of the indebtedness. Often such guarantees are available only from insiders of the borrower.

Accordingly, the focal issue of this case – whether the preference provisions of the Bankruptcy Code subject payments to a lender to the insider preference reachback of one year where the loan is guaranteed by an insider – is of grave concern to the Council and its members. Due to the long involvement of the Council and its members

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[1] American Council of Life Insurance, 1993 Life Insurance Fact Book Update p. 48 (ACLI, Washington D.C. 1993).

with loans guaranteed by insiders, and in the legislative process leading to the drafting of the Bankruptcy Code and the amendments thereto, the Council is uniquely qualified to comment on the language of the Bankruptcy Code governing preferential transfers and the effect of the *Deprizio* Doctrine on the legitimate expectations of lenders.

The Council offers this *amicus curiae* brief to support the Petitioner and to explain the serious impact that the holding below, if not reversed, could have on lenders and their willingness to make loans where an insider guarantee would be required.

SUMMARY OF ARGUMENT[2]

The *Deprizio* Doctrine represents an incorrect interpretation of the Bankruptcy Code and should be rejected by this Court for the following reasons:

1. The words "for the benefit of" Section 547(b)(1) of the Bankruptcy Code clearly mean, and were intended to prevent evasion of the preference provisions by indirect transfers to the creditor through a third party conduit. The *Deprizio* Doctrine would include any transfer to a creditor as being "for the benefit of" any other creditor

[2] The Council supports the thorough and well reasoned analysis regarding the sharp split among the courts on the *Deprizio* Doctrine and the uncertainty created by that split contained in the Petitioner's brief and the *amicus curiae* brief of the Commercial Finance Association, Inc. However, since those points have already been brought to the Court's attention, they will not be repeated here.

whose position is incidentally improved thereby. This interpretation is not supported by the language of the Bankruptcy Code or the intent of Congress.

2. If the *Deprizio* Doctrine's interpretation of "for the benefit of" were to be accepted, it might produce absurd and unintended results. For example, insider reachback limitations might be applicable to many preferential payments by general partnerships, and might also be applicable to all payments on senior mortgages where a junior mortgage is held by an insider.

3. The *Deprizio* Doctrine would treat the word "creditor" differently in different sections of the Bankruptcy Code, thus rendering the Bankruptcy Code internally inconsistent.

4. The effect of the *Deprizio* Doctrine is inequitable and carries with it potentially adverse ramifications for the national economy.

ARGUMENT

POINT I

THE *DEPRIZIO* DOCTRINE IS NOT SUPPORTED BY THE CLEAR LANGUAGE OF THE BANKRUPTCY CODE OR CONGRESSIONAL INTENT

The *Deprizio* Doctrine requires the application of the one-year insider preference period of Section 547(b)(4)(B) of the Bankruptcy Code to a payment made to a non-insider lender when an insider of the debtor has guaranteed the loan. The rationale underlying the *Deprizio* Doctrine is that the payment, while not made to the insider,

was "for the benefit of" the insider because it relieved the insider of its contingent obligations under the guarantee to the extent of the payment. Under the *Deprizio* Doctrine, the insider is a "creditor" of the payor/debtor because of the insider's contingent subrogation or indemnification rights against the payor/debtor.

This application of the one-year insider reachback period to transfers to non-insiders depends wholly on a distorted interpretation of the words "to or for the benefit of a creditor" in Section 547(b)(1). These words plainly mean that a transfer can constitute a preference if it is made to a transferee creditor directly or indirectly through a third party conduit. *See, e.g., In re Fabric Buys of Jericho, Inc.*, 33 B.R. 334 (Bankr. S.D.N.Y. 1983) (transfer to law firm could be a preference where law firm acted as a conduit when it received sums in escrow for the benefit of its client, who was a creditor of debtor). Indeed, Congress intended that this phrase would provide an effective means to recover preferential payments in situations where, rather than make a direct payment to a creditor (which payment would certainly be avoided as a preference), a transfer is made to a third party to whom a debt is presently owed by the creditor, in order to evade a bankruptcy court's ability to avoid such a payment.

The Bankruptcy Act of 1898, prior to its amendment by the Chandler Act of 1938 (the "Chandler Act"), did not specifically cover indirect transfers. Nevertheless, as explained by *Collier*, "courts of bankruptcy from the beginning placed emphasis upon the purpose and effect of a given transaction irrespective of the devious manner in which it was accomplished" since "[f]rom time immemorial courts of law have refused to sanction acts done

by indirection which, if performed directly, would be barred by the law." 3 *Collier on Bankruptcy*, ¶ 60.08 (14th ed. 1977).

The Chandler Act inserted the words "for the benefit of" to the preference provisions to codify the judicially created proscription of efforts to make transfers to creditors in devious evasion of the preference provisions. This change is described by Charles Elihu Nadler in "The Law of Bankruptcy" (1948) at Section 636 as follows:

> It is axiomatic that the courts will not permit by indirection what is prohibited directly. Here, too, it is the effect and not the mere form that is decisive. Where, therefore, the bankrupt attempts to evade a voidable preference by transferring the property in question to some third person, it will nevertheless constitute a voidable preference if the creditor gets the benefit thereof and all the other essential elements of a voidable preference are present.

The *Deprizio* Doctrine goes beyond this purpose and concludes that *any* transfer to a creditor automatically becomes a transfer for the benefit of any other creditor whose position is indirectly improved by the transfer.

While the inclusion of the words "for the benefit of" were obviously intended to deal with a transfer to a non-creditor for the benefit of a creditor, this brief does not contend that a transfer to a creditor can never be intended as a transfer to another creditor. However, where two such creditors are involved, there must be strong evidence that the transfer *which is in actual payment of the outside creditor's claim*, was really intended for the benefit of the inside creditor. No such evidence is needed

under the *Deprizio* Doctrine. Rather than analyze whether an indirect payment has been made purposely to evade a preference attack, the *Deprizio* Doctrine blindly and automatically stretches the language contained in the Bankruptcy Code to any creditor whose position is incidentally improved by the transfer, in order to obtain more funds for the estate at the expense of legitimate creditors.[3]

POINT II

THIS COURT SHOULD DECLINE TO FOLLOW THE *DEPRIZIO* DOCTRINE'S INTERPRETATION OF THE WORDS "FOR THE BENEFIT OF" AS IT WILL PRODUCE ABSURD RESULTS CLEARLY UNINTENDED BY THE DRAFTERS

The mechanistic application of the phrase "to or for the benefit of a creditor" supported by the *Deprizio* Doctrine leads to unintended and absurd results that would have a serious and adverse effect on the fair administration of the bankruptcy laws of this country, as the following illustrates.

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[3] Indeed the automatic nature of the *Deprizio* Doctrine ignores even the specific language of the Bankruptcy Code that the transfer must "benefit" the creditor. In many loans guaranteed by insiders, the guaranty is worthless in bankruptcy because the fortunes of the insider fall with the borrower. In such situations, the judgment-proof insider receives no benefit from the payment of the debt. Under the *Deprizio* Doctrine, no inquiry need be made as to whether a benefit was actually received by the insider.

A. Insider Reachback Limitations May Apply to Preferential Payments by General Partnerships on Recourse Debt Whether or Not an Insider Guaranty Is Involved

Partnerships generally have two types of debt – recourse and non-recourse.[4] Partnership law provides for joint and several liability of general partners. Unif. Partnership Act § 15. Thus, when a partnership makes a payment on an antecedent debt to a non-insider recourse creditor, it relieves all general partners of their obligation for the debt to the extent of the payment. Since the general partners are (a) "insiders" of the partnership under Section 101(31) of the Bankruptcy Code; and (b) "creditors" within the meaning of the definition of "creditor" in Section 101(10) of the Bankruptcy Code because of the partners' contingent rights under Section 18 of the Uniform Partnership Act to indemnification from the partnership, the insider preference reachback period will be applicable to any such payments.

Certainly, Congress never intended to make many such transfers by a partnership to non-insider creditors "insider transfers" for preference purposes. Yet, such a bizarre result, generating inconsistent preference treatment between transfers made by partnerships and transfers made by other business organizations such as corporations, would be the natural consequence of the acceptance of the *Deprizio* Doctrine. Accordingly, if the *Deprizio* Doctrine is widely accepted, it will result in

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[4] Long term real property mortgage debt held by a partnership is traditionally non-recourse to the partnership.

discouraging lenders from extending financing to partnerships, through which much of the legal, accounting, real estate and small commercial business in this country is conducted.

B. Preferential Payments to Senior Mortgagees Who Are Not Insiders Might Be Subject to the Insider Reachback Limitations Where a Junior Mortgage Is Held by an Insider

Businesses in need of additional funding often obtain such funds through loans from insiders secured by liens junior to existing mortgages. A payment to the senior mortgagee who is not an insider will benefit the junior insider mortgagee since it will increase the priority of the insider's lien to the extent of the payment. Under the *Deprizio* Doctrine, the payment would then be "for the benefit of" the insider. The junior insider mortgagee is clearly a creditor and if the other elements of a voidable preference are present, the one-year insider reachback provision will apply to the payments to the non-insider senior mortgagee pursuant to the *Deprizio* Doctrine.

Congress could not have intended that an outside mortgagee could become subject to the one-year preference reachback period by virtue of the borrower's act subsequent to the perfection of the mortgage over which the mortgagee has no control. The result of acceptance of the *Deprizio* Doctrine can only be to encourage the insertion of "due on encumbrance" provisions in mortgages, precluding businesses from obtaining junior financing from insiders, which may be the only method of keeping the business afloat at a time of national economic distress.

* * *

Due to the absurd consequences of adherence to the *Deprizio* Doctrine, this Court should decline to follow it. Indeed, numerous courts have declined to follow the *Deprizio* Doctrine based solely on the *inequities* inherent in it. *See, e.g., In re Aerco Metals, Inc.*, 60 B.R. 77 (Bankr. N.D. Tex. 1985); *In re R.A. Beck Builder, Inc.*, 34 B.R. 888, 894 (Bankr. W.D. Pa. 1983) ("Bank should not be penalized for its prudence in seeking a guarantor of the debt here in question"). Moreover, numerous commentators agree that the inequities posed by the *Deprizio* Doctrine require its rejection based on equitable principles. *Collier on Bankruptcy* provides a summary of this view:

> In some circumstances, a literal application of [the preference rules] would permit the trustee to recover from a party who is innocent of wrongdoing and deserves protection. In such circumstances the Bankruptcy Court should use its equitable powers to prevent an inequitable result. . . . *Otherwise, a creditor who does not demand a guaranty can be better off than one who does.*

4 *Collier on Bankruptcy* ¶ 550.02 (15th ed. 1991) (emphasis added); *see also* Robert F. Higgins & David E. Peterson, *Is There a One-Year Preference Period for Non-Insiders?*, 64 Am. Bankr. L.J. 383 (1990); David I. Katzen, *Deprizio and Bankruptcy Code Section 550: Extended Preference Exposure Via Insider Guarantees, and Other Perils of Initial Transferee Liability*, 45 Bus. Law. 511 (1990).

Given the vast inequities inherent in the *Deprizio* Doctrine, as well as the legal precedent which declines to follow it on equitable grounds, this Court should not

allow the *Deprizio* Doctrine to become the law of the United States.

POINT III

THE *DEPRIZIO* DOCTRINE'S INTERPRETATION OF THE PREFERENCE STATUTES RENDERS THOSE STATUTES INTERNALLY INCONSISTENT

The *Deprizio* Doctrine claims to be interpreting the preference provisions of the Bankruptcy Code in accordance with their "plain meaning." *See generally Deprizio, supra.* This theory of construction is sound. *Union Bank v. Wolas,* ___ U.S. ___, 112 S. Ct. 527, 116 L. Ed. 2d 514 (1991); *Toibb v. Radloff,* 501 U.S. 157, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991). While the Deprizio court paid lip service to that principle, it failed to follow it and resorted to manipulating and finessing the plain language contained in the relevant Bankruptcy Code preference provisions in reaching its desired goal – to hold lenders liable for alleged preference payments made in the full year prior to a bankruptcy filing. Indeed, the decision undermines the legal tenet that statutes must always be interpreted with a view toward avoiding and resolving internal inconsistencies. *United States v. Turkette,* 452 U.S. 576, 580 (1981); *United States v. Ferryman,* 897 F.2d 584, 589 (1st Cir. 1990); *In re Rau,* 113 B.R. 619, 622 (Bankr. 9th Cir. 1990). The following exemplifies how the *Deprizio* Doctrine promotes internal inconsistencies within the text of the Bankruptcy Code and evades the plain meaning of the preference statutes.

Once a preference is established under Section 547 of the Bankruptcy Code, the *Deprizio* Doctrine mandates that Section 550 controls the determination of who may

be liable for repayment of the preferential transfer. That section of the Bankruptcy Code states in pertinent part:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made. . . .

Under a *Deprizio* analysis, either the lender who received the payment or the inside guarantor may be held liable for such repayment. Section 547(b)(1) of the Bankruptcy Code, however, creates a clear distinction between the time frame applicable to a preference analysis for insiders – one year – as opposed to outside lenders – ninety days. Without deference to these specific statutory delineations, the *Deprizio* court determined that outside lenders would be held liable for repayment of any preferential amounts received during the full year prior to bankruptcy. Thus, the *Deprizio* decision single-handedly quadrupled the trustee's recovery rights against an outside lender in direct contradiction to the dictates of Section 547.

In *In re Midwestern Cos.*, 102 B.R. 169 (Bankr. W.D. Mo. 1989), the court addressed the inconsistencies articulated and supported by the *Deprizio* Doctrine:

> Basic statutory construction requires that statutes be construed in harmony with one another, favoring no one statute over another, except that

> specific statutes limit the scope of general statutes. . . . Section 547 is no less significant than Section 550, so the distinction drawn in the more specific Section 547 should be permitted to survive the application of Section 550.

Id. at 173; *see also In re Cove Patio Corp.*, 19 B.R. 843, 844 (Bankr. S.D. Fla. 1982) (Section 550(a)(1) was not intended to expand the trustee's right to recover preferences as provided in Section 547).

In the present case, as in *Midwestern* and *Cove Patio*, the statutory inconsistencies supported by the *Deprizio* Doctrine should not be advanced by this Court. Rather, to preserve consistency and the plain meaning of the relevant statutes, the time frames established in Section 547 should be applied to Section 550. Thus, even if this Court should accept the *Deprizio* interpretation of "to or for the benefit of a creditor" as applicable to any other creditor benefitted by a transfer, the ninety-day period should remain applicable to a preference to the transferee creditor while the one-year period should apply to the incidental beneficiary. To do otherwise would render a nullity the congressionally mandated distinctions between the treatment of insiders and non-insiders under Section 547 of the Bankruptcy Code. The law can easily distinguish between an outside lender and an inside guarantor in assessing preference liability without instinctively allowing claims against "deep pockets."

POINT IV

THIS COURT SHOULD DECLINE TO FOLLOW THE *DEPRIZIO* DOCTRINE BECAUSE OF ITS ADVERSE IMPACT ON THE ECONOMY AS A WHOLE

Traditionally, when faced with a loan application from any business without a high credit rating, such as a "mom and pop" shop, start-up company, ailing business or professional partnership, the lender (having no other source of collateral) requests a guarantee. Given the precarious financial condition of the borrower, often the lender can only obtain an inside guarantee. In light of the *Deprizio* Doctrine, lenders fearing preference attacks on payments made to them within a year of a bankruptcy filing have two choices: (1) to make a virtually unsecured loan and forego guarantees; or (2) to decline lending to entities or individuals with less than excellent credit histories. Obviously, the wiser and safer course for the lender is to choose the latter choice. Thus, the *Deprizio* Doctrine impedes the ability of the small, start-up or faltering business to obtain desperately needed credit or cash influxes, while larger "Fortune 500" businesses or individuals with substantial net worths remain largely unaffected. *See In re Rubin Bros. Footwear, Inc.*, 119 B.R. 416, 425 (Bankr. S.D.N.Y. 1990) ("[A]s a policy matter, the Court believes that the *Levit* rule would likely impede the availability of credit to ailing businesses. Because of its potential policy implications, and because the Second Circuit has not adopted it, the Court declines to apply the *Levit* rule to the instant case"). Moreover, the *Deprizio*

Doctrine, if widely accepted, would heighten to an extreme the amount of risk-taking by lenders.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Tenth Circuit should be granted.

Dated: New York, New York
February 28, 1994

Respectfully submitted,

CHRISTOPHER F. GRAHAM
THACHER PROFFITT & WOOD
Counsel of Record
for *Amicus Curiae*
Two World Trade Center
New York, New York 10048
(212) 912-7400

(8)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MANUFACTURERS HANOVER LEASING CORPORATION,
Petitioner,

v.

HAROLD G. LOWREY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONER

JAMES VOGT
REYNOLDS, RIDINGS, VOGT & MORGAN
First National Center West
120 N. Robinson, Suite 2200
Oklahoma City, OK 73102
(405) 232-8131
Counsel of Record

-and-

RICHARD GERARD
Manufacturers Hanover Leasing Corporation
270 Park Avenue, 40th Floor
New York, NY 10017
(212) 270-5026
Counsel for Petitioner

March 2, 1994

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RULE 29.1 STATEMENT

Petitioner, Manufacturers Hanover Leasing Corporation ("Manufacturers Hanover"), previously disclosed the required information in its Petition for Writ of Certiorari filed on January 27, 1994.

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REPLY BRIEF OF PETITIONER

POINT ONE

RULE 10.1(c) OF THE SUPREME COURT RULES PROVIDES THE BASIS FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

Despite the Respondent's contention that Rule 10.1(a) of the Supreme Court Rules is the only applicable reason for granting the Petition, Petitioner submits that Rule 10.1(c) applies regardless of whether Respondent's contention that no conflict exists among the circuits is correct. The Petition presents an important question of federal law that Respondent concedes has created considerable conflict in the lower courts which should be settled by the Supreme Court. The reasons listed in Rule

10.1 are not exclusive but rather outline basic reasons for granting certiorari.[1]

The importance of this issue is underscored by the five *amicus* briefs submitted by major national business organizations. These five organizations are:

> Commercial Finance Association, Inc.;
> The American Council of Life Insurance;
> American Bankers Association;
> The New York Clearing House Association; and
> Equipment Leasing Association of America, Inc.

Both the number and dollar amount of financial transactions involving the members of these diverse organizations where an insider has guaranteed the indebtedness is staggering. Because most of the members of these organizations conduct business on a nationwide basis, it is important that the Supreme Court grant the Petition in this case and resolve the uncertainty on this issue as it relates to each of these members' businesses. (*See* Petition at page 13). The need for uniformity in bankruptcy law on a nationwide basis cannot be overstated. This is most eloquently expressed by the Commercial Finance Association in its *amicus* brief at page 7 at which it concludes:

> In sum, the conflict over *Deprizio* is deep and wide, and can only be resolved by a decision of this Court. No good reason exists to postpone the inevitable—review by this Court—and allow the conflicting interpretations of the Bankruptcy Code to distort lending practices, or worse, to serve as a trap for lending institutions that do not accurately predict whether *Deprizio* will apply to their transactions.

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[1] *See* Commercial Finance Association, Inc.'s *amicus* brief at page 5. "Thus, the Court's ordinary preference for a circuit conflict to justify certiorari ought not to be slavishly adhered to in this case, where the division among the lower courts plainly exists and causes a serious disruption in the primary commercial activity of banks and other lending institutions."

POINT TWO

THE *DEPRIZIO* RATIONALE HAS NOT BEEN ADOPTED BY EVERY CIRCUIT COURT WHICH HAS CONFRONTED THIS ISSUE AS THE RESPONDENT SUGGESTS.

In his Brief in Opposition, Respondent represents that no conflict exists in the circuit courts and that five circuit courts which have "faced" the issue of the expanded preference period as to noninsider creditors have decided it in the same way. Therefore, Respondent contends that one can assume that any subsequent circuit court of appeals deciding a similar case will decide the issue in the same manner. (*See* page 3 of Brief in Opposition). Petitioner respectfully disagrees with the representations of the Respondent.

Respondent contends that the Fifth Circuit Court of Appeals has followed the *Deprizio* rationale in the *Matter of Southmark Corp.*, 993 F.2d 117 (5th Cir. 1993). Respondent is incorrect. A thorough analysis of *Southmark* clearly reveals that the Fifth Circuit Court of Appeals decided *Southmark* on a narrow issue and did not adopt the entire *Deprizio* rationale. The Fifth Circuit only decided the limited issue of whether § 547(b) required a nexus between the insider's claim and the debt underlying the transfer without reaching the threshold issue as outlined in *Deprizio*. *Id.* at 119. The Fifth Circuit could have followed the *Deprizio* rationale, thereafter disposing of the appeal as it did. Instead, the Fifth Circuit limited its holding to the more narrow issue. This is clear from its statement that only the *Deprizio* court discussed the nexus requirement, expressly omitting the other two circuits which followed *Deprizio*, but which did not discuss the nexus requirement. *Id.* at 120 n.4. In fact, the Fifth Circuit has indicated that it might not follow the *Deprizio* decision acknowledging the tension between its decision adopting the two transfer theory in *In re Compton Corp.*, 831 F.2d 586 (5th Cir. 1987) *on rehearing*, 835 F.2d 584 (1988) and the *Deprizio*

decision. *See In re T. B. Westex Food, Inc.*, 950 F.2d 1187, 1193-94 (5th Cir. 1992).

Like the Respondent, the Ninth Circuit Court of Appeals also incorrectly assumed that the Fifth Circuit Court of Appeals had followed *Deprizio* when it referenced the *Southmark* and *Westex* decisions in its opinion. *In re Suffola, Inc.*, 2 F.3d 977 (9th Cir. 1993). *Westex* expressly disclaims that it follows *Deprizio*, noting that its facts are entirely different in that they do not involve a guaranty held by a noninsider but rather payment on an insider's debt to a garnishee. *Westex*, 950 F.2d at 1194. Again, Petitioner disagrees with both the Respondent and the Ninth Circuit in its interpretation of the Fifth Circuit's decisions on *Deprizio*.

The First Circuit Court of Appeals also was presented with the insider guaranty issue in the case of *In re Erin Foods Services, Inc.*, 980 F.2d 792 (1st Cir. 1992). Rather than adopting the *Deprizio* rationale in its entirety allowing the First Circuit Court of Appeals to quickly dispose of the matter, it elected to circumvent the controversial issue and chose to decide the case on a more limited basis leaving the subject of whether *Deprizio* was correct or incorrect to another day. *Id.* at 798. In addition, the Fourth Circuit Court of Appeals acknowledged that the *Deprizio* decision was very "controversial" and had received "mixed critiques" and elected not to "comment on the viability of the theory." *Harman v. First American Bank of Maryland (In re Jeffrey Bigelow Design Group, Inc.)*, 956 F.2d 479, 483 (4th Cir. 1992).

Thus, three circuit courts have expressly avoided deciding the *Deprizio* issue when confronted by it. It is sheer oversimplification for the Respondent to claim that other circuit courts will follow *Deprizio* given the substantial disagreement among the lower courts.

Respondent's final argument is that there is an absence of intellectual breadth to the cases which disagree with

Deprizio. This is obviously not the case. Otherwise, the mountain of jurisprudential scholarship would not have been created on this issue.

POINT THREE

RESPONDENT'S BRIEF SUPPORTS PETITIONER'S CONTENTION THAT THE TENTH CIRCUIT COURT OF APPEALS' INTERPRETATION OF § 547 IS INCONSISTENT.

Despite the Respondent's support of the so-called "plain meaning" interpretation of § 547 of the Bankruptcy Code, his Brief in Opposition corroborates Petitioner's contentions. Respondent acknowledges that § 547(c) defenses are available to both the insider creditor and the noninsider creditor. (*See* page 7 of Brief in Opposition). Thus, Respondent essentially acknowledges that Manufacturers Hanover Leasing could argue any defenses available under § 547(c), yet could not argue any defenses under § 547(b), and in particular § 547(b)(4)(A) providing that transfers to noninsider creditors more than 90 days prior to the petition in bankruptcy cannot be avoided. Yet, the Respondent can cite to no statutory provision which denies a noninsider creditor its § 547(b)(4)(A) defense.

The Respondent cites to § 547(g) to support his statement that § 547(b) and (c) are two separate tests. However, § 547(g) does not provide separate tests. Rather, it only provides that the trustee has the burden of proof as to the elements of § 547(h), whereas the creditor has the burden of proof as to the elements of § 547(c).

This same inconsistent approach by the Tenth Circuit Court of Appeals in allowing § 547(c) defenses but denying § 547(b)(4)(A) defenses to noninsider creditors underscores the problem with the Tenth Circuit's interpretation of § 547 and the need for review by this Court of a "radical departure" from pre-Code law based on an ambiguous statute. *Dewsnup v. Timm*, 112 S. Ct. 773 (1992).

CONCLUSION

The Respondent's claim that there is unanimous acceptance of the *Deprizio* rationale by the circuit courts of appeals is unfounded. The continued refusal of lower courts to follow the *Deprizio* rationale, the uncertainty created in several circuits because of the circuit court's decision not to adopt *Deprizio* and decide the case on a narrow issue, and the request of major finance and trade organizations that the Court grant the Petition for Writ of Certiorari in this proceeding are compelling reasons for the Supreme Court to grant the Petition.

Respectfully submitted,

JAMES VOGT
REYNOLDS, RIDINGS, VOGT
& MORGAN
First National Center West
120 N. Robinson, Suite 2200
Oklahoma City, OK 73102
(405) 232-8131
Counsel of Record

-and-

RICHARD GERARD
Manufacturers Hanover
Leasing Corporation
270 Park Avenue, 40th Floor
New York, NY 10017
(212) 270-5026
Counsel for Petitioner

March 2, 1994